Docket for 02-1609

(12.)

No. 02-1609 Status: ARGUED
Title: City of Littleton, Colorado, Petitioner
v.
Z.J. Gifts D-4, L.L.C., a Limited Liability Company, dba Christal's
Docketed: May 6, 2003
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (01-1220)
Decision Date: November 18, 2002
Rehearing Denied: February 5, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 2 2003	Petition for writ of certiorari filed. (Response due June 5, 2003)
Jun 5 2003	Brief amici curiae of International Muncipal Lawyers Association, et al. filed.
Jun 6 2003	Order extending time to file response to petition to and including June 25, 2003.
Jun 25 2003	Brief of respondent Z.J. Gifts D-4, L.L.C. in opposition filed.
Jul 9 2003	DISTRIBUTED for Conference of September 29, 2003.
Oct 6 2003	DISTRIBUTED for Conference of October 10, 2003.
Oct 14 2003	Petition GRANTED.
Nov 19 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 12, 2003.
Dec 9 2003	Blanket consent to the filing of amicus briefs in support of either party received from counsel for petitioner and counsel for respondent.
Dec 9 2003	Motion to dispense with printing the joint appendix filed by petitioner.
Dec 12 2003	Brief of petitioner The City of Littleton, Colorado filed.
Dec 12 2003	Brief amici curiae of National League of Cities, et al. filed.
Dec 12 2003	Brief amicus curiae of Community Defense Counsel filed.
Dec 12 2003	Brief amici curiae of Ohio, et al. filed.
Jan 12 2004	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 12 2004	SET FOR ARGUMENT Wednesday, March 24, 2004.
Jan 14 2004	Extension of time within which to file respondent's brief on the merits to and including January 26, 2004.
Jan 23 2004	Brief of amici curiae American Booksellers Foundation for Free Expression, et al. filed.
Jan 26 2004	Brief of respondent Z.J. Gifts D-4, L.L.C., a Limited Liability Company, dba Christal filed.
Jan 26 2004	Brief amicus curiae of First Amendment Lawyers Association filed.
Jan 29 2004	Record received from the U.S.C.A. for 20th Circuit. (1 box)
Jan 30 2004	CIRCULATED.
Feb 5 2004	Motion for divided argument filed by petitioner.
Feb 9 2004	Record received from the U.S.D.C. for the District of Colorado. (1 box)
Feb 10 2004	Motion of Ohio, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Mar 1 2004	Reply of petitioner The City of Littleton, Colorado filed. (Distributed)
Mar 8 2004	Motion for divided argument filed by petitioner DENIED.

Mar 8 2004	Motion of Ohio, et al. for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 24 2004	Argued. For petitioner: J. Andrew Nathan, Denver, Colo.; and Douglas R. Cole, Ohio State Solicitor, Columbus, Ohio (for Ohio, et al., as amici curiae.) For respondent: Michael W. Gross, Denver, Colo.

ıe Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE CITY OF LITTLETON,

Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition involves a challenge by Respondent to the judicial review provisions of The City of Littleton's City Code, Title 3, Chapter 14, Section 8 ("the Ordinance"). The Ordinance governs the licensing of adult entertainment establishments within the City of Littleton. When a license is denied pursuant to this Ordinance, its provisions provide for "prompt access to judicial review" through Colorado's mandatory certiorari review procedure under Colo.R.Civ.P. 106(a)(4) (review in the nature of certiorari). This procedure was recently invalidated by the Tenth Circuit in *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). The Tenth Circuit Court of Appeals instead required that cities in Colorado guarantee that judges will render a "prompt judicial decision on the merits" when an adult business challenges an adverse licensing scheme.

This Petition seeks the resolution of a near complete division in the Circuits regarding the sufficiency of prompt access to an independent judicial officer when an adult business license is denied for violations of content-neutral time, place, and manner regulations. This question requires the Court to revisit the plurality decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). The present case asks this Court to resolve the conflict so municipal governments, seeking to regulate the negative secondary effects of sexually oriented businesses, may meet the correct standard for providing judicial review of licensing decisions.

QUESTIONS PRESENTED – Continued

The Questions Presented are:

For the purposes of reviewing content-neutral sexually oriented business licensing decisions, is prompt judicial access sufficient or must a city somehow provide a prompt judicial decision?

If prompt access to a court of law is insufficient, then what must a city do to provide sufficient safeguards under the First Amendment?

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PETITION FOR A WRIT OF CERTIORARI

The City of Littleton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion (App. 1-39) is published at *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). The Tenth Circuit's order denying rehearing *en banc* (App. 68-69) is unpublished. The District Court's opinion and order (App. 40-67) is unpublished.

JURISDICTION

The Tenth Circuit denied Petitioner's timely petition for rehearing *en banc* on February 5, 2003. (App. 68-69) This court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on a writ of certiorari.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Article II, Section 10 of the Colorado Constitution and Article III of the Colorado Constitution provide:

Article II, Bill of Rights

Section 10. Freedom of speech and press.

No law shall be passed impairing the freedom of speech; every person shall be free to

speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

Article III
Distribution of Powers

The powers of the government of this state are divided into three distinct departments, – the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Reproduced in the appendix is Colo. R. Civ. P. 106, (App. 70-74) and the original and amended versions of Chapter 14 of Littleton's Municipal Ordinance (Section 3-14-1 *et seq.*). (App. 75-116)

STATEMENT OF THE CASE

This case raises an important issue as to whether a content-neutral time, place and manner regulation, which provides prompt access to judicial review, satisfies constitutional requirements.

Background

The City of Littleton's ("Littleton's") Municipal Code, originally passed in 1993, set forth a variety of zoning and

licensing requirements with regard to sexually oriented businesses. (App. 75-111) Before passing its licensing and zoning[1] Ordinance, the City Council considered evidence which addressed the adverse secondary impact of adult businesses, including increased crime, decreased property values and urban blight. (App. 75-82) Prior to the Tenth Circuit's decision, Littleton had amended its Ordinance in an attempt to comply with previous changes in the law. (App. 112-116)

Littleton's Ordinance contains zoning restrictions which mandate where in the City sexually oriented businesses can operate. The Ordinance provides that adult businesses may operate in Littleton's Industrial, or I-1 and I-2 zone districts, subject to certain distance requirements. Respondent Z.J. Gifts D-4, L.L.C. d/b/a Christal's (hereafter "ZJ") is open and operating in Littleton's B-2 (business) zoned district, a zoned district where the use is not permitted.

ZJ's Claims Below

Shortly after it opened, without applying for or having been denied a license, ZJ brought an action under 42 U.S.C. § 1983, challenging Littleton's adult business Ordinance as unconstitutional and seeking declaratory and injunctive relief, as well as attorneys' fees and damages.

Despite ZJ's arguments to the contrary, the District Court found that ZJ's was an adult business. (App. 54-55)

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[1] The zoning issues at stake in the trial court are not at issue here, and, therefore are described only peripherally.

ZJ argued that the Ordinance was unconstitutional because it infringed on ZJ's First Amendment rights. ZJ further argued that Littleton did not have sufficient avenues of communication for sexually oriented businesses. Littleton argued that its Ordinance was constitutional in all aspects.

On cross motions for summary judgment, the District Court granted Littleton's motion and found the Ordinance constitutional in its entirety. (App. 40-67) The Tenth Circuit affirmed the District Court's holdings that ZJ's was an adult business (App. 12, fn. 6), and the Tenth Circuit affirmed the District Court's holding that Littleton's locational restrictions were constitutional and that there were ample avenues of communication open for adult businesses in Littleton. (App. 33-38)

Licensing

ZJ also brought constitutional challenges with regard to several aspects of the Ordinance's licensing provisions. The Littleton Ordinance requires sexually oriented businesses to obtain a license in order to operate. The Tenth Circuit rejected all of ZJ's claims regarding its challenges to the licensing provisions, save three. (App. 15-33) Two of the claims were premised upon the Ordinance's failure to specify a time limit within which the City had to act with regard to the timing of fingerprinting and photographing, and the time frame within which a statement would be provided by the City Zoning Officer. (App. 20-23) The Tenth Circuit found those two provisions unconstitutional, but severable (App. 24), and Petitioner did not seek rehearing on them.

With regard to the third licensing provision, related to the granting or denial of a license, the Tenth Circuit noted that the Circuits were divided over the definition of the "prompt judicial review" requirement as adopted by this Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 107 L. Ed. 2d 603, 620, 110 S. Ct. 596, 606 (1990). The Tenth Circuit overruled the Colorado Supreme Court in holding that prompt judicial review means that there must be a guarantee of a prompt decision.

Under Littleton's Ordinance there are eight narrow grounds upon which a license can be denied[2] and the

[2] Section 3-14-8 Application/Denial of License provides that after an application has been submitted, the City Clerk has thirty days to approve or deny the license. The Clerk may deny an application based on one or more of eight specified grounds as follows: [t]he applicant is under twenty-one years; [t]he applicant has made a false statement upon the application or gave false information in connection with an application; [t]he applicant or any holder of any class of stock, or a director, officer, partner, or principal of the applicant has had an adult business license revoked or suspended anywhere within the State of Colorado within one year prior to the application; [t]he applicant has operated an adult business which has determined to be a public nuisance under state law or this Code within one year prior to the application; [a] corporate applicant is not in good standing or authorized to do business in the State of Colorado; or [t]he applicant is overdue in the payment to the City of taxes, fees, fines, or penalties, assessed against him/her or imposed against him/her in relation to an adult business; [t]he applicant has not obtained required sales tax licenses; [t]he applicant has been convicted of a specified criminal act. (App. 96) Specified criminal act is defined in the Ordinance as sexual crimes against children sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, pandering or tax violation. (App. 88 & 112, § 3-14-2 original definitions and as amended)

All of these licensing provisions were upheld by the Tenth Circuit which found that such provisions did not involve or permit unbridled discretion on the part of licensing officials. (App. 29, fn. 13)

Ordinance contains very specific provisions governing the appeal process which provides access to and the guarantee of judicial review in the event of a denial.[3] (App. 96-97 & 114) Pursuant to the Ordinance, an applicant has twenty

[3] Section 3-14-8(B) (as amended App. 114) provides as follows: In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by certified mail to the address shown in the application within ten (10) days after denial. An applicant shall have the right to a hearing before the City Manager as set forth in subsection 3-14-11(C) of this Chapter. A written request for such hearing shall be made to the City Manager within twenty (20) days of the date of the denial of the license by the City Clerk. This hearing shall be held within thirty (30) days from the date a timely request for hearing is received by the City Manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection 3-14-11(C) of this Chapter.

1. Section 3-14-8(B) (as amended App. 114) (1)(2)(3) (App. 97) At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department or other enforcement officers, the applicant, or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the City Clerk. In such cases where specified criminal acts are in issue, the provisions of C.R.S. § 24-5-101 shall control.

2. If the City Manager determines that the applicant is ineligible for a license per Subsection (A) hereof, he/she shall issue an order sustaining the City Clerk's denial of the application, within twenty days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to or be served on the applicant at the address of the application.

3. The order of the City Manager made pursuant to paragraph 2 above shall be a final decision and may be appealed to the District Court pursuant to Colorado Rule of Civil Procedure 106(a)(4). Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

days to appeal a denial of a license to the City Manager who must hold a hearing within thirty days. In the event the appeal is denied, then the applicant may seek review in the State District Court pursuant to Colorado Rule of Civil Procedure 106(a)(4) for certiorari review of a quasi-judicial administrative decision.

The District Court found that the Rule 106 review procedure providing for prompt judicial review met constitutional standards. (App. 63-66) The Tenth Circuit reversed the District Court holding that prompt judicial review requires the City to ensure that a court of law will issue a "prompt judicial decision" on the merits of an adult business' appeal of an adverse decision. (App. 32-33) The Tenth Circuit offered no guidance as to how a municipality could craft such a guarantee, given the inherent limitations on legislative authority over judicial acts.

Littleton filed a petition for rehearing *en banc* on the narrow issue of what process is necessary to satisfy the prompt judicial review requirement in this context, where the government does not pass judgment on the content of an applicant's speech. (App. 117-132) The petition was denied on February 5, 2003. (App. 68-69)

Eight Circuits have now considered the sufficiency of prompt judicial review in the context of content-neutral licensing ordinances. Four have reached a conclusion contrary to the Tenth Circuit. This Court now has an opportunity to clearly define the requirement of prompt judicial review in time, place and manner regulations of expressive conduct.

On these issues, Littleton hereby respectfully submits its Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This case presents important and compelling issues of constitutional law which warrant this Court's intervention. The Circuits which have addressed the meaning of "prompt judicial review" are hopelessly deadlocked both as to result and reasoning. The conflicting decisions on this issue illustrate the confusion which has spread through the lower courts, spawned by this Court's plurality decision in *FW/PBS*. The issue will not go away. With time the schism has only become increasingly confusing as municipalities struggle to comply with an undefined and moving target in an attempt to regulate adult businesses.[4] The conflicting and incongruous results have bred additional litigation and have resulted in unwarranted and unnecessary attacks on adult business ordinances that have frustrated the efforts of municipalities to regulate the admittedly "serious problems" caused by sexually oriented businesses. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), citing, *Berman v. Parker*, 348 U.S. 26, 75, 99 L. Ed. 27, 75 S. Ct. 98 (1954), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). The well established constitutional concept of analyzing content-neutral adult

[4] For at least ten years the definition of "prompt judicial review" has been the subject of divergent decisions at both the state and federal levels, commencing with the First Circuit's 1993 decision in *Jews for Jesus v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993), and culminating most recently in a Sixth Circuit decision in *Deja Vu of Cincinnati, L.L.C. v. Union TownShip Board of Trustees*, 2003 U.S. App. Lexis 7720 (April 24, 2003) where that court noted that the Circuit Courts are currently divided about what constitutes "prompt judicial review."

business ordinances under the time, place and manner test has been steadily eroded.

Four Circuits, the First, Fifth, Seventh and Eleventh,[5] which have considered the issues upon which this Petition is predicated, found that the requirement of "prompt judicial review" is satisfied under the First Amendment where there is prompt access to a court of law following a denial of a license to operate. Four Circuits, the Fourth, Sixth, Ninth[6] and now the Tenth, have held that "prompt judicial review" requires a prompt judicial decision. The decisions of these Circuits have resulted in invalidating numerous local ordinances and placing local governments in a "Catch 22" with respect to their efforts to regulate sexually oriented businesses. Either municipalities must allow sexually oriented businesses to operate

[5] *See, TK's Video, Inc., v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085, 128 L. Ed. 2d 464, 114 S. Ct. 1837 (1994); *Jews for Jesus v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993); and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020, 146 L. Ed. 2d 315, 120 S. Ct. 1423 (2000). There is also an indication that the Second Circuit in *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999) would follow the reasoning and logic adopted in the line cases above in noting, but without deciding, that prompt access to judicial review in state courts would be constitutionally sufficient. The Colorado Supreme Court in *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo. 1995) has also concluded that the requirement of prompt judicial review is satisfied through Colorado's expedited judicial review procedure as set forth in Colo.R.Civ.P. 106(a)(4)(V) and Colo.R.Civ.P. 106(a)(4)(VIII).

[6] *See, 11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995) (*en banc*) *cert. denied*, 502 U.S. 819, 116 L. Ed. 2d 50, 112 S. Ct. 76 (1991); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); and *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998).

with impunity or risk adopting licensing ordinances and becoming entangled in the confusing legal morass generated by the divergent state and federal court decisions. These risks include being subjected to damage claims as well as 42 U.S.C. § 1988 attorneys' fees.

This Court previously granted certiorari in *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 151 L. Ed. 2d 783, 122 S. Ct. 775, 781 (2002)[7] and in *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 148 L. Ed. 2d 757, 121 S. Ct. 743 (2001)[8] to resolve the circuit split in defining "prompt judicial review." Neither case, however, for different reasons, reached this issue. This case provides an ideal opportunity for this Court to finally clarify whether prompt access to the judiciary sufficiently safeguards an adult business's interests.

The question in *Thomas* and *Waukesha* involved the issue of whether a prompt judicial determination of any appeal from a denial of a license or permit is constitutionally required or whether the First Amendment is satisfied by affording unsuccessful licensing applicants prompt access to judicial review.[9]

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[7] In *Thomas*, this Court granted certiorari, recognizing that the Courts of Appeals were divided as to whether the requirement of prompt judicial review means a prompt judicial determination or prompt commencement of judicial proceedings. *Thomas*, 534 U.S. at 316.

[8] In *Waukesha*, this Court granted certiorari on the sole question of whether the guarantee of prompt judicial review must accompany an adult business licensing scheme and whether it means a prompt judicial determination on the merits of a permit denial or simply prompt access to judicial review. *Waukesha*, 531 U.S. at 280.

[9] In *Thomas*, the application was for a park permit, and in *Waukesha* the application was for an adult business license. In *Waukesha*, this

(Continued on following page)

In *Thomas*, this Court found that censorship was not at issue and that a *Freedman* analysis was not necessary. This Court reiterated that time, place and manner regulations contain adequate standards so long as they cabin an official's discretion and render it subject to effective judicial review. *Thomas*, 534 U.S. at 322-323. Petitioner contends that identical safeguards are sufficient in the context of content-neutral adult business regulations. To be sure, the Littleton Ordinance differs from the ordinance in *Thomas* because the Littleton Ordinance is directed at sexually oriented businesses, but this feature merely demonstrates adherence to this Court's requirement that such ordinances be "narrowly tailored" to effect only that category of [businesses] shown to produce the unwanted secondary effects, thus avoiding the flaw [of overbreadth] that proved fatal to the regulations in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975).

This case provides an ideal vehicle for this Court to finally resolve these issues and eliminate the uncertainties which have placed municipalities in the untenable position outlined above. This case squarely presents the issue upon which the lower courts are split.

In addition, while some of the Circuits that have analyzed this issue have considered the sufficiency of "access to" judicial review within the context of common law certiorari, the Littleton Ordinance specifically provides for and mandates judicial review under Rule 106 of

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Court failed to reach the issue upon which certiorari was granted because the Court found that the issue was moot.

the Colorado Rules of Civil Procedure. This provision, which provides for certiorari review of quasi-judicial decisions, is relied upon to provide prompt judicial review not only by Littleton, but also by many other municipalities in Colorado.[10] Colo.R.Civ.P. 106 is a mandatory review in the nature of certiorari and provides for an expedited review.[11] Although the crevasse dividing the courts centers upon the definition of prompt judicial review, the state and federal courts are further fractured based upon whether the subject ordinance contains a provision on its face for judicial review, whether the ordinance provides for access to the judiciary or whether a judicial hearing is guaranteed, and whether common law certiorari practice, statute, or writs of mandamus are sufficient to avoid constitutional infirmities. Colorado's Rule 106 provision guarantees immediate access to an independent judiciary and it should provide appropriate protection in cases like this where censorship is not at issue and governmental interests are "undeniably important." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000).

As the Colorado Supreme Court explained:

> The provisions of C.R.C.P. 106(a)(4)(V) and C.R.C.P. 106(a)(4)(VIII) establish procedures for both a stay of the effect of an adverse decision and expedited review thereof. Under these circumstances, we conclude that C.R.C.P. 106 and the Ordinance provide adequate safeguards to ensure that any impermissible prior restraint on a particular applicant's protected rights of free speech may be remedied promptly by judicial intervention.
>
> We also conclude that C.R.C.P. 106(a)(4)(V) and C.R.C.P. 106(a)(4)(VIII) provide "an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial." *FW/PBS*, 493 U.S. at 229 (plurality opinion). The provisions of C.R.C.P. 106(a)(4)(VIII) specifically authorize a district court to accelerate or continue any action, and, as indicated, C.R.C.P. 106(a)(4)(V) authorizes a district court to stay any decision to deny, suspend, or revoke a license. These provisions are adequate to withstand the plaintiffs' facial challenge to the Ordinance.

City of Colorado Springs v. 2354, Inc., 896 P.2d 272, 284 (footnotes omitted)

Thus, Littleton's Ordinance, on its face, provides prompt access to judicial review of content-neutral licensing decisions and thereby adequately safeguards the rights of adult businesses.

The Tenth Circuit, in its ruling, much like the other Circuits who have required a prompt judicial decision, has effectively imposed the third *Freedman*,[12] requirement –

[10] A review of approximately fifty Colorado municipal codes reveals at least thirty-two municipalities (or approximately 60%) rely on Colo.R.Civ.P. 106(a)(4) or procedures substantially similar to Littleton's Ordinance with respect to licensing schemes in the context of adult businesses and Colo.R.Civ.P. 106(a)(4) provisions are also utilized in other municipal licensing schemes in which free speech is implicated. (App. 135-136 & 138).

[11] Colo.R.Civ.P. 106(a)(4)(VIII) (App. 70-74).

[12] In *Freedman*, this Court set forth three procedural safeguards to ensure expeditious decisionmaking by a motion picture censorship board, which the *FW/PBS* Court outlined as follows: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor

(Continued on following page)

which this Court held did not apply in these circumstances – by requiring the City to "bear the burden" upon a license denial. Although the Tenth Circuit's opinion does not address how cities can comply with its "prompt judicial decision" requirement, other "prompt judicial decision" courts have required cities to give offending adult businesses temporary or provisional licenses to operate during judicial review. Thus, the incentives discussed in *FW/PBS*, 493 U.S. at 229-230, are reversed and the adult business itself have every incentive to drag its heels and delay the determination on the merits.

The *Freedman* requirements were designed for a content-based censorship scheme, not for a content-neutral licensing scheme. The Tenth Circuit's holding is in direct contradiction to this Court's holding in *FW/PBS* and further demonstrates the extent to which basic, long standing jurisprudential concepts are either being ignored, misunderstood or misapplied because the tests and standards have become completely muddled.

In *FW/PBS* this Court recognized the significant differences between censorship schemes and content-neutral licensing schemes. This Court explicitly declined to shift the burden of going forward and the burden of proof to the government in a licensing scheme and it set forth in detail the basis for its rationale. *FW/PBS*, 493 U.S. at 230. After delineating those differences, this Court applied only a portion of the *Freedman* requirements to a content-neutral licensing scheme.

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must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *FW/PBS*, 493 U.S. at 227.

The *FW/PBS* Court explained that the licensing scheme at issue did not "present the grave dangers of a censorship system," and that a censorship system creates special concerns for the protection of speech, because "the risks of freewheeling censorship are formidable." *FW/PBS*, 493 U.S. at 229 (citing, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 43 L. Ed. 2d 448, 459, 95 S. Ct. 1239, 1247 (1975)). Censors engage in direct censorship of expressive material, whereas in a licensing scheme the government does not exercise discretion by passing judgment on the content of protected speech. *FW/PBS*, 493 U.S. at 229-230. Censors reach subjective conclusions regarding speech, whereas licensing officials review the general qualifications of the applicant, a review which is objective in nature. The burden of proceeding with litigation is placed upon censors because otherwise the private party may be deterred from challenging any denial, in which case a denial might be tantamount to complete suppression of speech. Licensing applicants, on the other hand, have much more at stake because obtaining a license is the key to maintaining a business and therefore there is every incentive for the applicant to pursue any denial. *Id.* Moreover, licensing laws impinge only incidentally upon protected speech, because such laws are aimed at the secondary effects of such speech, rather than the content of speech. *11126 Baltimore Blvd., Inc.*, 58 F.3d at 1003 (Niemeyer, J., concurring in part and dissenting in part).

The Court in *FW/PBS* did not specifically address the issue of whether prompt judicial review would be satisfied in a content-neutral licensing scheme if the subject ordinance contained a specific provision – such as Colorado's Rule 106 procedure – because the subject ordinance in *FW/PBS* contained neither the possibility of, nor an avenue for judicial review.

FW/PBS did not require a "prompt judicial decision" and did not place the burden of initiating litigation or the burden of proof, once in court, on the City. Citing to *Freedman*, Justice O'Connor referred to the second *Freedman* prong in the following manner: "expeditious judicial review of that decision must be available." *FW/PBS*, 493 U.S. at 227. Justice O'Connor further stated that there must be the "possibility of" or an "avenue for" prompt judicial review. *FW/PBS*, 493 U.S. at 228-29. Notably absent from her opinion was any requirement that there be a "prompt judicial decision." The essence of the safeguard is in the availability of the review. Here, the Tenth Circuit, by requiring a prompt judicial decision, has conflated the standards traditionally used to analyze a content-based censorship scheme onto a content-neutral licensing scheme, and it has also shifted the burden of obtaining judicial review to the government, thereby reinstituting *Freedman's* third prong and applying it within the context of a content-neutral licensing scheme.

The *Renton* and *Young* Courts recognized the inherent value and importance which should be ascribed to the right of municipalities to regulate, through zoning and licensing schemes, the character of a city, using content-neutral time, place, and manner regulations. At the very least, the Tenth Circuit's decision in this case creates significant impediments and dangers for cities who attempt to regulate sexually oriented businesses.

Moreover, municipalities simply cannot assure that an independent judiciary will provide an expedited decision. Such a requirement fails to take into account the Separation of Powers Doctrine. Article III of Colorado's Constitution divides the powers of government into three distinct, co-equal branches, and directs that "no person or

collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." Colo. Const. Art. III.

The Colorado Supreme Court discussed this principle in the case of *In the Interest of J.E.S.*, 817 P.2d 508 (Colo. 1991). The Court reaffirmed long standing jurisprudence that while the three departments of government must co-operate and complement each other, they may not interfere with or encroach on the authority of the other. "It is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source." *Id.* at 511.

Nevertheless, this unworkable requirement has led to the invalidation of almost all adult business regulatory schemes in Colorado. By imposing on municipalities a fundamentally impossible duty to guarantee judicial action, the Tenth Circuit has unreasonably restricted the ability of Littleton and other cities, at least in Colorado, to have a workable regulatory licensing scheme for sexually oriented adult businesses. The unrealistic nature of this requirement has not been lost on other courts:

> In demanding this greater assurance, *Freedman* and *Baby Tam & Co.* may impose an impossible burden on the City. The City lacks the authority to prescribe a specified time when a state or federal judicial officer must render a decision. It has been suggested that the California Legislature would do so – at least with respect to state judicial officers – but even the state's authority is doubtful.

Mai Lee Le v. City of Citrus Heights, 1999 U.S. Dist. Lexis 13477 at 23 (E.D. Cal. 1999) (unpublished).

In *Mai Lee Le*, the Legislative Counsel of California asserted that even a state law requiring a prompt decision after a petition for writ of mandamus, seeking judicial review of a license denial, would likely violate the separation of powers doctrine. But the impossibility of the requirement did not dispose of its potency:

> In sum, *Freedman* and *Baby Tam and Co.* insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – *however impractical they may be* – are the law.

Id. at 24 (*emphasis supplied*).

The First Amendment does not require such impossible results that plainly infringe on the independence of the judiciary and threaten the very purposes behind the separation of powers doctrine. The First Amendment does not require that municipalities grope for solutions which may not work[13] or forego regulation of adult businesses. The decisions of the Circuits requiring a "prompt judicial decision" have also had the effect of requiring that provisional licenses be given to adult businesses in violation of regulations that advance substantial government interest and are "not at all inherently related to expression." *Pap's*

[13] *See, Deja Vu of Cincinnati, L.L.C. v. Union TownShip Board of Trustees,* 2003 U.S. App. Lexis 7720 (April 24, 2003) (the Sixth Circuit held that a temporary permit given during judicial review was not able to save the municipality from the requirement that it guarantee a judge's prompt determination of the merits of an adult businesses's challenge).

A.M., 529 U.S. at 291 (2000) (plurality opinion) (quoting, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991) (Souter J., concurring in judgment)).

The Tenth Circuit's decision also assumes that state judges will forsake the duties of their office by refusing to render a prompt decision. Judges in the courts of the State of Colorado have the same duty to apply the protections of the United States Constitution as do federal judges. It must be assumed that a judge hearing a Colo.R.Civ.P. 106 review will recognize an obligation to proceed promptly and exercise the power to grant a stay, to expedite the determination or provide such other temporary relief as may be appropriate.

The Tenth Circuit decision also assumes that Littleton officials charged with licensing decisions should not be trusted. "[A]dult businesses are controversial, and the possibility exists that licensing officials might allow their personal views on the morality of sexually explicit entertainment to sway a decision on an application." (App. 31)

The Tenth Circuit essentially articulated fears that local licensing officials would exceed their authority and view the Ordinance as a "subterfuge for censorship." (App. 31) This theme is inherent in the decisions of the other Circuits that have required a prompt judicial decision. Yet this Court has never endorsed such a supposition. Rather, this Court has consistently held that courts must not presume bias, bad faith, or *ultra vires* action on the part of city officials. Indeed, the required presumption as to public officials is that "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 71 L. Ed. 131, 47 S. Ct. 1 (1926);

United States v. Armstrong, 517 U.S. 456, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996).[14]

Finally, the requirement to have a prompt judicial decision seems to create the absurd result of favoring the free speech rights of sexually oriented business over such things as core political speech. Long established First Amendment principles have virtually been turned upside down by recognizing fewer restrictions and providing greater protections for speech which is associated with sexually oriented businesses, which have traditionally enjoyed only the outer perimeter of First Amendment protections, than those enjoyed by core political speech. As noted by Justice Stevens writing for the Court in *Young*:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lessor magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see

[14] Moreover, in this case, Littleton officials perform acts which are essentially ministerial in nature and cannot be argued to be presumptively invalid. As noted by the Tenth Circuit, none of the eight specific reasons to deny a license involved discretion on the part of the licensing official. (App. 29, fn. 13)

> "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

Young, 427 U.S. at 70.

Yet the Tenth Circuit's decision has now effectively elevated sexually oriented speech above core political speech.

In *Thomas*, this Court found that a permit which regulated the time, place and manner of core political speech satisfied First Amendment principles. This Court analyzed *Freedman* and found that *Freedman* was inapposite because the licensing scheme at issue in *Thomas* was not subject matter censorship, but rather was a content-neutral time, place, and manner regulation. Indeed, as noted by this Court, the ordinance did not authorize a licensor to pass judgment on the content of speech and none of the grounds for denying the permit have anything to do with what the speaker might say.

Littleton's Ordinance is directly akin to the ordinance in *Thomas*, in that it does not give authorities unbridled discretion to deny a license. Nonetheless, the Tenth Circuit's decision has given sexually oriented businesses the more stringent protections afforded under *Freedman*. This has the dual effect of giving core political speech less protection than sexually oriented speech and treating content-neutral licensing schemes like content-based censorship schemes, although the two concepts have always been treated differently.

CONCLUSION

Under the current state of the law, municipalities are stuck between the proverbial rock and the hard place. The Circuits are hopelessly divided and whether a city can regulate adult businesses by licensing depends more on which Circuit the city is in rather than on whether the regulatory scheme meets the standards set by the Constitution.

This Court should resolve the issue and provide the guidance necessary to permit cities to perform their duty to mitigate the adverse secondary effects of adult businesses. Such guidance would not only resolve the uncertainty which currently exists, but it would help reduce a significant source of litigation and avoid the chill that 42 U.S.C. § 1988 exposure places on governments when they are required to act without guidance at their peril.

For these reasons, Littleton believes that certiorari review by this Court is warranted and compelling, and respectfully requests that its Petition herein be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Z. J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company, doing business as Christal's, Plaintiff-Appellant, v. CITY OF LITTLETON, an Incorporated Home Rule Municipal Corporation, Defendant-Appellee.	No. 01-1220

Appeal from the United States District Court for the District of Colorado (D.C. No. 99-N-1696)

(Filed Nov. 18, 2002)

Michael W. Gross (Arthur M. Schwartz with him on the brief) of Schwartz & Goldberg, P.C., Denver, Colorado for the Plaintiff-Appellant.

J. Andrew Nathan (Heidi J. Hugdahl with him on the brief) of Nathan, Bremer, Dumm & Myers, P.C. Denver, Colorado for the Defendant-Appellee.

Before **BRISCOE**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **LUCERO**, Circuit Judge.

LUCERO, Circuit Judge.

This case raises several First Amendment issues, including one in which the circuits are substantially divided: namely, the extent to which prompt judicial review must be assured in adult-business licensing cases. Plaintiff Z.J. Gifts D-4, L.L.C. ("ZJ") brought an action under 42 U.S.C. § 1983 challenging the City of Littleton's ("City's" or "Littleton's") adult business ordinance as unconstitutional, seeking declaratory and injunctive relief, attorney's fees, and damages. The district court granted summary judgment to the City. We have jurisdiction under 28 U.S.C. § 1291, and we reverse in part and affirm in part.

I

In 1993, the City passed an ordinance requiring businesses that specialize in adult entertainment or merchandise to obtain licenses, and restricting those businesses to certain areas of Littleton. Before passing its ordinance, the City Council heard testimony and reviewed reports from other cities concerning deleterious effects of adult businesses on property values and on crime rates.

In the fall of 1999, ZJ opened its store, known as Christal's, on South Broadway in Littleton. Prior to the opening of Christal's, the City informed the owner of the property on which Christal's was located that adult businesses were not permitted at this South Broadway location. In late August 1999 – shortly before Christal's opened – ZJ filed a § 1983 suit against the City seeking monetary, declaratory, and injunctive relief. ZJ's complaint alleged that Littleton's ordinance was unconstitutional because,

among other things, it infringed ZJ's First Amendment rights. ZJ also alleged that it did not intend to operate an "adult business establishment" as defined in Littleton's ordinance. (1 Appellant's App. at 11.)

On cross-motions for summary judgment, the district court ruled in favor of the City, concluding that ZJ was covered by Littleton's ordinance and that the ordinance was, in its entirety, constitutional. After the district court's decision in this case and during the briefing for this appeal, the City amended its ordinance, clarifying certain corporate disclosure requirements and changing an age restriction for adult businesses that do not offer live entertainment. Littleton, Colo., Ordinance 13 (2001) (codified at Littleton, Colo., City Code § 3-14-2, -5, -8, -16 (2002)).

II

Both as originally enacted and as amended, Littleton's ordinance has two primary functions: (1) it requires all adult businesses within Littleton to obtain licenses to operate within the City's borders, and (2) it restricts those businesses to certain sections of the City and requires that they not locate within a minimum distance of other specified sites.

Among the adult businesses covered by Littleton's ordinance, Christal's would most likely qualify as an "adult bookstore, adult novelty store, or adult video store." Littleton, Colo., City Code § 3-14-2. A commercial establishment falls into this category if, as judged by percentage of stock-in-trade, revenue, or advertising, it is primarily devoted to the sale of materials that are characterized by the depiction or description of "specified sexual activities"

or "specified anatomical areas," regardless of whether the establishment has other business purposes. *Id.* "Specified anatomical areas" are further defined as: "(A) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or (B) Human male genitals in a discernibly turgid state, even if completely and opaquely covered." *Id.* "Specified sexual activities" are defined to include masturbation, fondling of the genitals and other specified areas, excretory functions, human genitals in a state of "sexual stimulation, arousal or tumescence," and "normal or perverted" sex acts. *Id.*

No adult business covered by Littleton's ordinance may operate within five-hundred feet of a church, school, child-care facility, public park, massage parlor regulated by local ordinances, or community correctional facility. *Id.* § 3-14-3. Adult businesses also may not operate within one-thousand feet of each other or a massage parlor regulated by state law. *Id.* In addition, multiple adult businesses may not operate within the same structure. *Id.*

Under Littleton's ordinance, operation of an adult business within the City requires a license. Among other things, a license application must indicate or provide: names of all owners, managers, and employees of the business; information about whether the applicant has had an adult-business license denied, revoked, or suspended by any jurisdiction; an indication whether the applicant has adult-business licenses from other jurisdictions; the address, driver's license number, and social security number of the applicant and all owners, managers, and employees; a floor plan for the proposed business; a written statement by the City's Zoning Officer that the proposed location is in compliance with the ordinance; and

a statement of whether an owner, manager, or employee of the business has been convicted of specified criminal acts.[1] *Id.* § 3-14-5. Certain specified persons must also be fingerprinted and photographed by the Police Department. *Id.*

After an application has been submitted, the City Clerk has thirty days to approve or deny the license. *Id.* § 3-14-8. The Clerk may deny an application for one or more specified reasons, including: the applicant is under twenty-one years old; the applicant has made a false statement on the application; the applicant or any owner has had an adult-business license revoked or suspended within Colorado in the past year; the applicant has operated an adult business deemed to be a public nuisance in the past year; a corporate applicant is not in good standing or authorized to conduct business in Colorado; the applicant is overdue in any city taxes, fees, fines, or penalties assessed in relation to an adult business; the applicant has failed to obtain the required sales-tax license; or the applicant has been convicted of specified criminal acts. *Id.* Specified criminal acts for the purposes of the ordinance are defined as: "Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, pandering or tax violation." *Id.* § 3-14-2.

If the clerk denies the application, the applicant then has twenty days to appeal the denial to the City Manager,[2]

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[1] In amending its ordinance in 2001, the City added more specific corporate disclosure requirements, but did not significantly alter the key provisions. Littleton, Colo., Ordinance 13 (2001).

[2] This is the time limit under the amended ordinance. Before the amendments, the ordinance gave the applicant only ten days to request

(Continued on following page)

who must hold a hearing within thirty days. *Id.* § 3-14-8. If that appeal is denied, the applicant may seek review in state court pursuant to Colorado Rule of Civil Procedure 106(a)(4). *Id.*

Licenses are issued for one-year terms and may be renewed only by filing a renewal application. *Id.* §§ 3-14-9, -10. Licenses may be suspended for one or more specified grounds. *Id.* § 3-14-11. Suspension or revocation may only occur after a hearing before the City Manager and may be appealed to state court. *Id.* Finally, under the amended ordinance, all adult businesses in Littleton that do not provide live entertainment are required to restrict entrance to individuals who are eighteen or older.[3] *Id.* § 3-14-16.

III

We initially determine whether there is an Article III case or controversy before us. *Essence, Inc. v. City of Fed. Heights,* 285 F.3d 1272, 1280 (10th Cir. 2002). Standing is an essential part of the case-or-controversy requirement of Article III. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). There are three elements to Article III standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Essence,* 285 F.3d at 1280. An injury-in-fact is an "'invasion of a legally protected interest' that is (a) concrete and

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a hearing before the City Manager. Littleton, Colo., Ordinance 27 (1993).

[3] Under the original ordinance, admission to all adult businesses was limited to persons over twenty-one. Littleton, Colo., Ordinance 27 (1993).

particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." *Id.* (quoting *Defenders of Wildlife,* 504 U.S. at 560). Causation requires a showing that the injury is "'fairly trace[able] to the challenged action of the defendant,' rather than some third party not before the court." *Id.* (quoting *Defenders of Wildlife,* 504 U.S. at 560). Redressability means that it is "likely that a favorable court decision will redress the injury of the plaintiff." *Id.* "The burden to establish standing rests on the party invoking federal jurisdiction." *Id.* When the case has been resolved in the district court on summary judgment grounds, "'a plaintiff must establish that there exists no genuine issue of material fact as to justiciability,' and 'mere allegations' of injury, causation, and redressability are insufficient." *Id.* (quoting *Dep't of Commerce v. United States House of Representatives,* 525 U.S. 316, 329 (1999)).

A

Standing usually requires that the plaintiff assert an injury to himself, rather than injuries to third parties not before the court. However, this rule is not strictly enforced in the context of facial challenges to laws as violative of the First Amendment, even though a facial challenge to the validity of a statute necessarily entails a challenge to the statute as applied to third parties besides the plaintiff:

> In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.

Freedman v. Maryland, 380 U.S. 51, 56 (1965); *see also FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223 (1990) (opinion of O'Connor, J.) ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad."). "A form of unbridled discretion is the failure to place brief, specific time limits on the decision-making process." *Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 889 (6th Cir. 2000); *see also FW/PBS,* 493 U.S. at 223-24 (opinion of O'Connor, J.) (stating that unbridled discretion includes licensing schemes that create a "'risk of delay' such that 'every application of the statute creates an impermissible risk of suppression of ideas'" (quotations omitted)).

Littleton's ordinances include within their purview sexually explicit speech, and the City does not contest that this speech is protected by the First Amendment. ZJ's challenge to Littleton's licensing system is based both on a claim that the City vests too much discretion in licensing officials in granting or denying a license, and that the system creates a risk of delay in granting or denying a license. Thus, ZJ has standing to bring a facial challenge to the licensing system on these two grounds.

It is true that the overbreadth doctrine discussed above "does not eliminate the need for the plaintiff to demonstrate its own cognizable injury in fact." *Nat'l Council for Improved Health v. Shalala,* 122 F.3d 878, 883 (10th Cir. 1997). But this requirement is satisfied where the plaintiff is engaged "in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution."

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 288 (1979). Such a plaintiff need not wait until an actual criminal prosecution has begun. *Id.*

ZJ's business depends in part on its ability to sell materials that are protected by the First Amendment. ZJ has alleged in its complaint that the City views it as an adult business that is in violation of the licensing requirements of the ordinance, and it has also presented a letter from the City denying ZJ's sales-tax license application because ZJ's business "may be categorized as an adult business." (3 Appellant's App. at 450.) ZJ has thus adequately shown that, at least from the City's perspective, its business is proscribed by the ordinance.

Finally, the City has proceeded with a civil complaint in state court against ZJ for violation of the ordinance based on ZJ's failure to apply for an adult-business license and ZJ's operation of an adult business without a license.[4] While ZJ's sales-tax license application was denied and a civil complaint was brought in state court only after ZJ's federal complaint was filed, these events nonetheless are evidence that when ZJ filed its lawsuit there was "a credible threat of prosecution" under Littleton's ordinance and that the threat of prosecution continues. *Babbitt,* 442 U.S. at 298; *see also id.* at 302 (indicating that standing exists "when fear of criminal prosecution under an allegedly

[4] In supplemental briefing the City explicitly waived the applicability of abstention under *Younger v. Harris,* 401 U.S. 37 (1971). A state may voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.,* 477 U.S. 619, 626 (1986) (citing cases in which *Younger* abstention was waived).

unconstitutional statute is not imaginary or wholly speculative"). ZJ has satisfied the injury-in-fact requirement because the City has taken steps to enforce the ordinance against ZJ.[5]

B

ZJ also has standing to challenge the location requirements in Littleton's ordinance. Both parties agree that ZJ's business is located on a site in which adult businesses are not permitted under the ordinance. Based on the location of ZJ's business, the City has refused to grant ZJ a sales-tax license, and the City's complaint in state court is based in part on the location of ZJ's business. This is sufficient evidence for ZJ to meet the injury-in-fact requirement. By enacting and enforcing its ordinance, the City brought about ZJ's injury, and injunctive and declaratory relief, if granted by this court, would redress ZJ's injury.

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[5] While ZJ has never applied for an adult-business license, this is not a requirement for standing to mount a facial challenge against an ordinance. *See ACORN v. Municipality of Golden*, 744 F.2d 739, 744 (10th Cir. 1984) ("Applying for and being denied a license or an exemption is not a condition precedent to bringing a facial challenge to an unconstitutional law.").

ZJ, the City argues, has no standing to challenge the licensing requirements of the ordinance because – even if such a challenge were successful – ZJ would nonetheless be in violation of the location requirements of the ordinance. However, ZJ challenges both sets of requirements, and if both challenges are successful, then ZJ will obtain its desired relief. *See N. Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 443-44 (7th Cir. 1996). In addition, the parties' supplemental briefs reveal that the City is charging ZJ with separately violating both the licensing and location requirements. Thus, even if ZJ only succeeds in its challenge to the licensing provisions, it will nonetheless obtain some relief against prosecution by the City.

C

ZJ has challenged the provisions in Littleton's ordinance that require the City to reject adult-business license applications when the applicant has been convicted of specified past criminal acts. ZJ has never alleged that these restrictions would apply to any of the owners or operators of ZJ's business. ZJ therefore has not even argued that it might be affected by these provisions in Littleton's ordinance, and accordingly it does not have standing to challenge these provisions. *See FW/PBS*, 493 U.S. at 234 (stating that for a party to have standing to challenge a similar provision in a Dallas ordinance, "the individual must show both (1) a conviction of one or more of the enumerated crimes, and (2) that the conviction or release from confinement occurred recently enough to disable the applicant under the ordinance").

ZJ also attacks the ordinance's license revocation and suspension provisions. ZJ, however, has never obtained a license from the City, nor has it indicated that it plans to obtain a license. Instead, ZJ stated in its complaint that it "does not intend to operate an adult entertainment establishment in a B-2 zone." (1 Appellant's App. at 11.) ZJ has neither alleged nor provided any evidence that the licensing suspension or revocation proceedings will apply to it. As it is "pure conjecture," *Essence*, 285 F.3d at 1281, whether ZJ will be forced to comply with these provisions of the ordinance, ZJ likewise does not have standing to challenge these provisions. *Cf. id.* (holding that an adult business did not have standing to challenge a city's provisions for the granting of a license because the business already had a license and had not alleged any facts indicating that it would need to reapply for a license).

D

ZJ decries as overly vague the ordinance's definition of an "adult bookstore, adult novelty store, or adult video store" as a business that "devotes a significant or substantial portion" of its floor space, inventory, or advertising to adult materials, or that obtains "a significant or substantial portion" of its revenue from those materials. Littleton, Colo. City Code § 3-14-2.

In the First Amendment context, the Supreme Court has determined that a plaintiff *may* have standing to challenge a statute as overly vague with respect to third parties *even if* the suspect statute is "unquestionably applicable" to the plaintiff. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59-60 (1976) ("On several occasions we have determined that a defendant whose own speech was unprotected had standing to challenge the constitutionality of a statute which purported to prohibit protected speech, or even speech arguably protected."). This "exception from traditional rules of standing" reflects the Supreme Court's judgment that "the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression." *Id.* at 59-60.[6]

[6] Having reviewed the evidence provided by the parties in the present case, including the videotape of the interior of ZJ's business, we conclude that the ordinance is "unquestionably applicable" to ZJ – i.e., a "significant or substantial" portion of ZJ's stock-in-trade, interior floor space, or revenue is devoted to material that is "characterized by the depiction or description" of the defined "specified sexual activities" or "specified anatomical areas."

Nevertheless, as the Court in *Young* explained, "if the statute's deterrent effect on legitimate expression is not both 'real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' the litigant is not permitted to assert the rights of third parties." *Id.* at 60 (citation omitted, quoting *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975)).

In *Young,* the Court concluded that the ordinance in question did not have a "real and substantial" deterrent effect on legitimate expression because "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Id.* at 61. The same rationale applies equally to the present case. Adult businesses covered by Littleton's ordinance are, by definition, likely to carry materials that border on pornography. Stated simply, in light of *Young,* Littleton's ordinance does not have a "real and substantial" deterrent effect upon "legitimate expression."

As to the second issue raised by *Young* – whether the ordinance is readily subject to a narrowing construction – we note that language similar to the "significant or substantial" language used in this ordinance has been interpreted previously by state courts in a sufficiently narrow manner to avoid constitutional problems. A common method of narrowing construction has been to develop a percentage that will act as a guide as to what constitutes "significant or substantial." *See, e.g., Dandy Co. v. Civil City of South Bend,* 401 N.E.2d 1380, 1385-86 (Ind. Ct. App. 1980) (holding that a conviction under a similar ordinance was sustainable where there was evidence that "50 to 80% of the inventory was adult in nature"); *St.*

Louis County v. B.A.P., Inc., 25 S.W.3d 629, 630-31 (Mo. Ct. App. 2000) (noting that a local adult-business ordinance established a rebuttable presumption that a business carries "a substantial portion" of adult-oriented items where more than twenty-five percent of the retail value of the inventory consists of such items); *City of New York v. Les Hommes*, 724 N.E.2d 368, 370 (N.Y. 1999) (noting that the City of New York had clarified that a "substantial portion" for purposes of its adult-business ordinance meant at least forty percent). We conclude that "the limited amount of uncertainty in the ordinance[ ] is easily susceptible of a narrowing construction." *Young*, 427 U.S. at 61.

In short, we agree with the district court that ZJ "does not have standing to challenge the constitutionality of [Littleton's ordinance] under the void for vagueness doctrine." (3 Appellant's App. at 561.)

E

Finally, Littleton's ordinance as originally enacted prohibited individuals under twenty-one years of age from being licensees, owners, managers, employees, or customers of an adult business. ZJ argues that it is unconstitutional to restrict individuals between the ages of eighteen and twenty-one from entering or working in its business. We need not address ZJ's challenge to the age restrictions, however, because the City has amended its ordinance to provide that anyone over eighteen years of age may enter

an adult business that does not offer live entertainment.[7] Thus, ZJ's challenge to the age restrictions on customers and employees of its business is now moot, and we will not address it.

IV

We now address ZJ's claims that Littleton's licensing scheme grants excessive discretion to licensing officials.

Because this case was decided on summary judgment, we review the district court's decision de novo, applying the same legal standard as the district court. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) para. 4. "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the non-moving party." *Simms*, 165 F.3d at 1326. "If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law." *Id.* In the First Amendment context, "[o]ur review of the record is more rigorous," and we are "obligated to make an independent

[7] To the extent that other provisions of Littleton's ordinance conflict with this amendment, they have been repealed. Littleton, Colo., Ordinance 13, § 9 (2001).

examination of the record in its entirety." *Essence,* 285 F.3d at 1283 (quotation omitted).

Littleton's ordinance requires all adult businesses to obtain a license prior to opening for business. "Adult businesses," as defined by the ordinance, include adult bookstores and adult video stores, *see* Littleton, Colo., City Code § 3-14-2, that sell materials presumptively protected by the First Amendment.[8] A very similar licensing scheme was analyzed as a "prior restraint" on speech by six of the Justices of the Supreme Court in *FW/PBS,* 493 U.S. at 225-30 (opinion of O'Connor, J.); *id.* at 238 (Brennan, J., concurring). Following *FW/PBS,* we have concluded that "licensing of adult entertainment establishments" must be analyzed as a prior restraint. *Essence,* 285 F.3d at 1289-90.

Ordinarily, a duly enacted law is presumed to be constitutional. When a law infringes on First Amendment rights, however, the proponent of the law bears the burden of establishing its constitutionality. *Wilson v. Stocker,* 819 F.2d 943, 949 (10th Cir. 1987). Whether or not Littleton's ordinance is content-neutral is not relevant to the burden of proof, because any "system of prior restraint" comes to this court "bearing a heavy presumption against its constitutional validity." *FW/PBS,* 493 U.S. at 225 (quotation

[8] In the instant case, the City does not argue that the materials sold by "adult businesses" are obscene and therefore unprotected by the First Amendment. The City has therefore effectively made the same concession that the City of Dallas made in *FW/PBS*: i.e., that the ordinance applies to businesses that purvey speech protected by the First Amendment. *See FW/PBS,* 493 U.S. at 224 (noting that the Dallas ordinance largely targeted businesses that purvey sexually explicit speech and no claim was made that such materials were unprotected by the First Amendment).

omitted). In the present case, therefore, the City bears the burden of establishing that Littleton's ordinance is constitutional.

A

Standards for analysis of a prior restraint of speech were initially developed in the context of censorship schemes in *Freedman,* where the Supreme Court held that (1) a censorship scheme must assure the exhibitor, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) the censorship scheme must "assure a prompt final judicial decision" following a refusal to license; and (3) "the burden of proving that the film is unprotected expression must rest on the censor." 380 U.S. at 58-59.

In *FW/PBS,* a divided Supreme Court considered whether *Freedman's* procedural requirements applied to adult-business licensing schemes as well. Two Justices joined Justice O'Connor in announcing the judgment of the Court that the Dallas licensing scheme at issue was unconstitutional. *FW/PBS,* 493 U.S. at 229. Three other Justices concurred but would have gone further in applying the *Freedman* requirements. *Id.* at 238-39 (Brennan, J., concurring). Justice O'Connor's opinion characterizes *Freedman* as mandating that any prior restraint "that fails to place limits on the time within which the decisionmaker must issue the license is impermissible," *FW/PBS,* 493 U.S. at 226, because a "scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech," *FW/PBS,* 493 U.S. at 227. The Court in *FW/PBS* determined that the

Dallas ordinance failed to meet this general requirement because a license could not be approved without inspection and approval by the fire department, the health department, and the building official as being in compliance with relevant laws and ordinances. *Id.* Even though a completed license application had to be approved or disapproved within thirty days after submission, there was nonetheless a risk that the city could endlessly delay those inspections and approvals in order to postpone consideration of a license application because there was no time limit for the inspections and approvals. *Id.* Concluded the Court: "Thus, the city's regulatory scheme allows indefinite postponement of the issuance of a license." *Id.*

Justice O'Connor then reiterated the *Freedman* procedural requirements:

> [T]he following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

Id. at 227. Concluding that the "first two safeguards are essential" to preventing undue delay in the licensing process, *id.* at 228, and that the Dallas licensing scheme "fails to provide an avenue for prompt judicial review" of a license denial, *id.* at 229, Justice O'Connor's opinion held that *Freedman*'s third requirement – that the censor bear the burden of obtaining judicial action and of proof – need

not be applied in the context of adult-business licensing schemes. *Id.* at 230.

The remainder of the Court was sharply divided. Justice Brennan, joined by two other Justices, agreed that the Dallas ordinance was an unconstitutional prior restraint, but would have applied all three of the *Freedman* procedural requirements. *Id.* at 238-39 (Brennan, J., concurring). Justice White, joined by the Chief Justice, concluded that the Dallas ordinance was constitutional and that none of the *Freedman* procedural requirements applied because the ordinance was not a prior restraint. *Id.* at 245 (White, J., concurring and dissenting). Justice Scalia concurred in part and dissented in part on other grounds. *Id.* at 250 (Scalia, J., concurring and dissenting).

Faced with the fractured decision in *FW/PBS*, our sibling courts of appeals have struggled to determine which of *Freedman*'s requirements apply to licensing schemes. Joined by several other circuits, we have concluded that the first two *Freedman* requirements – maintenance of the status quo and expeditious judicial review – are applicable to the licensing context. *See Essence*, 285 F.3d at 1290; *see also, e.g., Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100-01 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 996 & n.12 (4th Cir. 1995); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 707-08 (5th Cir. 1994). With respect to *Freedman*'s third requirement – that the censor must bear the burden of going to court and of proof – our circuit has not yet decided whether it is applicable to adult-business licensing schemes. *See Essence*, 285 F.3d at 1290 n.17. Other circuits, however, have held that the third requirement of *Freedman* does not apply to licensing

schemes that do not directly regulate content. *See MacDonald v. City of Chicago,* 243 F.3d 1021, 1035-36 (7th Cir. 2001); *Ward v. County of Orange,* 217 F.3d 1350, 1355 (11th Cir. 2000); *Steakhouse, Inc. v. City of Raleigh,* 166 F.3d 634, 640-41 (4th Cir. 1999). Because ZJ does not argue that the Littleton ordinance fails to satisfy the third *Freedman* requirement, we limit our analysis here to the two procedural safeguards clearly adopted in *FW/PBS.*

B

Our first inquiry is whether Littleton's ordinance satisfies the requirement that "any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained." *FW/PBS,* 493 U.S. at 227. Although the ordinance specifies that a license application must be approved within thirty days, Littleton, Colo., City Code § 3-14-8, ZJ stresses that, before an application is accepted, (1) applicants are required to obtain a written statement from the City's Zoning Official stating that the proposed location is in compliance with the location requirements of the ordinance, (2) specified persons named on the application must be fingerprinted and photographed by the Police Department,[9] and (3) the applicant must obtain a sales-tax

[9] Littleton's original ordinance required all principal owners, managers and employees to be photographed and fingerprinted. Littleton, Colo., Ordinance 27 (1993). In 2001, the City eliminated the requirement with respect to employees, but specified that managers, general partners and (in the case of a corporation) the president of the corporation must be photographed and fingerprinted. Littleton, Colo., Ordinance 13 (2001). No time limit for the fingerprinting and photography

(Continued on following page)

license. ZJ argues that these provisions present the possibility of indefinite postponement of a license. *Id.*

Justice O'Connor's opinion in *FW/PBS,* which announced the judgment of the Court, held that the Dallas ordinance in question allowed for indefinite postponement of a license because the premises had to be approved in advance by "the health department, fire department and the building official." 493 U.S. at 227. Although the prerequisites required by Littleton's ordinance are arguably less onerous than those in *FW/PBS,* Littleton's ordinance similarly does not specify a time limit within which the City must complete them. We therefore consider whether they render Littleton's ordinance unconstitutional for failure to satisfy the first requirement of *Freedman* and *FW/PBS.*

Every retail business in Colorado must obtain a sales-tax license. Colo. Rev. Stat. § 39-26-103. Because this requirement is not specific to adult businesses, it is irrelevant to the constitutionality of the licensing ordinance at issue in the present case. The City does not argue, however, that the other two requirements are similarly applicable to all businesses, and we therefore presume that they are specific to adult businesses. Littleton's ordinance provides no assurance that the City will promptly act on a pre-application request for a certification of zoning compliance or for fingerprinting or photography.

During oral argument of the present case, counsel for the City offered to make a "judicial admission" on behalf of

was specified either in the original ordinance or in the amended ordinance.

the City that "if the Zoning Official doesn't act, the application can be complete without his statement." Littleton's ordinance, however, explicitly states that the "City Clerk shall not accept any application that is not complete in every detail." Littleton, Colo., City Code § 3-14-5. Such details presumably include the provision of the Zoning Official's letter as well as the requirements of photography and fingerprinting by the Police Department. By interpreting the ordinance as allowing for the submission of an incomplete application in the event of delay by the Zoning Official, appellee's counsel is stating a legal conclusion, and courts are reluctant to treat opinions and legal conclusions as judicial admissions. *See MacDonald v. General Motors Corp.,* 110 F.3d 337, 341 (6th Cir. 1997); *Glick v. White Motor Co.,* 458 F.2d 1287, 1291 (3d Cir. 1972); *New Amsterdam Cas. Co. v. Waller,* 323 F.2d 20, 24 (4th Cir. 1963). "A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument." *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 398 (1988) (Stevens, J., concurring in part and dissenting in part).

Moreover, *Freedman* requires that either a "statute or authoritative judicial construction" must specify the time limit within which the license must be issued or denied, 80 U.S. at 58-59, and there is nothing in Justice O'Connor's opinion suggesting that this requirement was changed in *FW/PBS.* Federal courts "lack jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 369 (1971). Only if a state law is "readily susceptible" of an interpretation may the federal courts subject it to a narrowing construction, and "we will not rewrite a state law to conform it to constitutional requirements." *Am. Booksellers Ass'n,* 484

U.S. at 397 (majority opinion). Because Littleton's ordinance is not "readily susceptible" to the interpretation offered by the City – to the contrary, it is readily susceptible to the opposite interpretation – much as we are tempted, we cannot decide this case on the basis of Littleton counsel's oral argument offer.

Although the Colorado Supreme Court upheld a similar requirement that a zoning permit must accompany the application for a sexually-oriented-business license in *City of Colo. Springs v. 2354, Inc.,* 896 P.2d 272, 281-82 (Colo. 1995), a separate Zoning Ordinance in that case required that a zoning administrator "approve or deny a zoning permit application within ten working days of the submittal." *Id.* at 282. Counsel for the City implicitly conceded at oral argument that no such time limit is present in this case. Because no time limit is specified in the ordinance or by authoritative judicial construction, we hold that the subject ordinance's requirement that a letter from the Zoning Official accompany the application, along with the fingerprinting and photography requirements, are unconstitutional for failure to specify a time limit within which the City must act.[10] *See FW/PBS,* 493 U.S. at 227. To the extent that the City's motion for summary

[10] As noted above, this defect in Littleton's ordinance cannot be cured by "judicial admission," as the City's counsel suggests. Appropriate procedures under Colorado law for the amendment of a city ordinance must be followed. It is not our role to sit as a party to negotiations concerning the implementation of the City's code. Littleton's ordinance can easily be amended to state that an application may be submitted without zoning approval, fingerprinting, or photography if a good faith request is not acted on by the Zoning Official or the Police Department within a specified brief time period.

judgment on this point was granted and ZJ's motion for partial summary judgment was denied, the order of the district court is reversed.

C

Having held that Littleton's ordinance fails to meet the first test of *FW/PBS,* we must decide whether the unconstitutional provisions are severable. Under Colorado law, a section of a legislative enactment is severable if the remaining portion of the statute is autonomous and the legislature's will in passing the entire statute is not thwarted by the excision. *City of Lakewood v. Colfax Unlimited Ass'n,* 634 P.2d 52, 70 (Colo. 1981) (en banc). Utilization of a severability clause creates a presumption that the legislature would have been satisfied with the remaining portions of the enactment. *Id.* A provision will not be held severable, however, if the remaining enactment is "so incomplete or riddled with omissions" that it lacks coherence. *Id.*

At issue in the present case is an ordinance that contains a severability clause, both in its original version and in the amended version. Littleton, Colo., Ordinance 13, § 8 (2001); Littleton, Colo., Ordinance 27, § 8 (1993). More importantly, other requirements of the ordinance do not depend upon the constitutionally suspect pre-application requirements for coherence or consistency, and the purpose of the ordinance is not thwarted by their excision. As a result, we conclude that the pre-application licensing provisions of the ordinance are severable.

D

Because other provisions of Littleton's ordinance, if constitutional, may be enforced without the pre-application requirements, we must decide whether the remainder of the ordinance is constitutional. Thus we consider the "prompt judicial review" requirement adopted by the Supreme Court in *FW/PBS,* 493 U.S. at 228. ZJ argues that "prompt judicial review" requires the City to provide a "prompt decision" from the courts as to whether a license should have been granted or denied. (Appellant's Br. at 23.) According to the City, however, "prompt judicial review" means only that there must be " 'the possibility' or 'an avenue' for prompt judicial review," and there need not be a "judicial determination" within a short period of time. (Appellee's Am. Resp. Br. at 47.)

The circuits are divided over this question. Some have held that "prompt judicial review," at least with regard to licensing decisions, requires only that the government provide prompt *access* to the courts. *See, e.g., Boss Capital, Inc. v. City of Casselberry,* 187 F.3d 1251, 1256-57 (11th Cir. 1999) (concluding that "access to prompt judicial review is sufficient for *licensing* decisions"); *TK's Video v. Denton County,* 24 F.3d 705, 709 (5th Cir. 1994) (same); *see also Graff v. City of Chicago,* 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc) (opinion of Manion, J.) (noting the availability of the common-law writ of certiorari and finding this procedure sufficient under *FW/PBS*); *Jews for Jesus v. Mass. Bay Trans. Auth.,* 984 F.2d 1319, 1327 (1st. Cir. 1993) (implying that access is sufficient). Others have concluded that "prompt judicial review" requires a prompt judicial *resolution* of license denials. *See Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1101-02 (9th

Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County,* 58 F.3d 988, 1000-01 (4th Cir. 1995).

Access to prompt judicial review was selected as the appropriate standard by the Eleventh Circuit in *Boss Capital,* 187 F.3d at 1255-57. That case enunciates two principal bases in support of its holding that mere access is sufficient in adult-business licensing cases. First, *Boss Capital* holds that Justice O'Connor modified the second *Freedman* requirement relating to judicial review in the adult-business licensing context. *Id.* at 1255-56. Second, *Boss Capital* reasons that this interpretation of *FW/PBS* is appropriate given the difference between censorship cases and licensing cases. *Id.* at 1256-57.

Focusing on Justice O'Connor's language, the Eleventh Circuit points out that Justice O'Connor uses different terminology than Justice Brennan in describing *Freedman*'s second requirement. *Id.* at 1255 (citing *FW/PBS,* 493 U.S. at 228-29). Justice O'Connor's opinion holds that there must be "the *possibility* of prompt judicial review" in the event a license is denied, *FW/PBS,* 493 U.S. at 228 (opinion of O'Connor, J.) (emphasis added), and states that the Dallas ordinance failed to provide an "*avenue* for prompt judicial review," *id.* at 229 (emphasis added). Later, the requirement is characterized by Justice O'Connor as "the *availability* of prompt judicial review." *Id.* at 230 (emphasis added). In contrast, Justice Brennan's concurrence states that a "prompt judicial *determination* must be available." *Id.* at 239 (Brennan, J., concurring) (emphasis added).

Justice O'Connor's language could arguably mean that the *FW/PBS* Court modified the second *Freedman* requirement in the context of licensing cases. *See Boss*

Capital, 187 F.3d at 1255-56 (relying partially on the difference of language to distinguish *Freedman* from *FW/PBS*).[11] It is by no means clear, however, that Justice O'Connor intended to change the meaning of the "prompt judicial review" requirement. First, when Justice O'Connor refers to "prompt judicial review," she cites to *Freedman,* which unequivocally stated that the procedure must "assure a prompt final judicial determination." 380 U.S. at 59; *see also 11126 Baltimore Boulevard,* 58 F.3d at 999 (discussing this point). Other decisions following *Freedman* have used the phrase "prompt judicial review" to indicate a prompt judicial *determination,* albeit in a censorship context. *See 11126 Baltimore Boulevard,* 58 F.3d at 1000 (listing several Supreme Court cases). Moreover, elsewhere in her opinion in *FW/PBS,* Justice O'Connor states that the "first two safeguards" provided

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[11] If the O'Connor opinion did modify *Freedman*'s "prompt judicial review" requirement for the licensing context, then it arguably struck down the ordinance at issue in *FW/PBS* on a narrower ground (failure to provide prompt *access* to judicial review) than the Brennan concurrence would have (failure to provide the prompt judicial *determination* required by *Freedman*). If that is the case, then the O'Connor restatement of the "prompt judicial review" requirement might well state the law, at least in the context of adult business licensing. *See Marks v. United States,* 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotation omitted)). Whether this would constitute the narrowest ground for decision is debatable, however. *See 11126 Baltimore Boulevard,* 58 F.3d at 999 & n.15 (arguing that, if Justice O'Connor modified the *Freedman* requirement, this was not the narrowest ground for decision). Because we conclude that Justice O'Connor did not modify the second *Freedman* requirement in the licensing context, we need not decide which ground for decision in *FW/PBS* was the narrowest.

for by *Freedman* are "essential." *FW/PBS,* 493 U.S. at 228. Although Justice O'Connor inevitably qualifies the prompt judicial review requirement by referring to the "possibility," "availability," or "avenue" of such review, such qualification most likely amounts to an acknowledgment that it is up to the plaintiff to decide whether or not to seek judicial review. This language does not necessarily indicate any intent to weaken the second *Freedman* requirement.

Parties always have *access* to the courts. *See FW/PBS,* 493 U.S. at 248 (White, J., dissenting) ("[N]o one suggests that licensing decisions are not subject to immediate appeal to the courts."); *Baby Tam,* 154 F.3d at 1101 ("[A] person always has a judicial forum when his speech is allegedly infringed." (quoting *Graff,* 9 F.3d at 1324)). Judicial review is available regardless of whether an applicable state court procedure is expressly mentioned in the ordinance. In order to have "prompt judicial review," however, a party necessarily must be able to obtain a *decision,* for "without a decision, the most exhaustive review is worthless."[12] *Baby Tam,* 154 F.3d at 1101-02. Thus, Justice O'Connor's "avenue for prompt judicial review" requirement in a First Amendment context makes far more sense if it is understood to mean a prompt final judicial determination.

[12] *Baby Tam* draws an analogy to baseball. Judicial review without a decision "would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klem once said to an inquisitive catcher: 'It ain't nothin' till I call it.' This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'." 154 F.3d at 1102.

The Eleventh Circuit further points out in *Boss Capital* that *Freedman* and the line of cases following it can be distinguished from adult-business licensing cases on the grounds that they involved censorship rather than licensing. Justice O'Connor held in *FW/PBS* that licensing schemes do not involve "the grave 'dangers of a censorship system,'" and therefore "the full procedural protections set forth in *Freedman* are not required." 493 U.S. at 228 (citation omitted). As the Eleventh Circuit notes, adult-business licensing schemes primarily involve "mundane and ministerial factors," such as the general qualifications of each applicant.[13] *Boss Capital,* 187 F.3d at 1256. In contrast, censorship cases involve a highly subjective judgment about the nature of the suspect material.

In addition, the Eleventh Circuit notes, "unlike movie distributors who might show a given film in hundreds of theaters around the country," applicants for adult-business licenses arguably have a greater incentive "to stick it out and see litigation through to its end." *Id.* at 1256. *Freedman*'s rationale therefore arguably makes less sense in the licensing context, and *Boss Capital* concludes that the need for a prompt judicial decision is therefore "less compelling."[14] *See Boss Capital,* 187 F.3d at 1256-57 (arguing that

[13] Littleton's ordinance, for example, lists eight specific reasons to deny a license – although the ordinance does not explicitly state that this list is exclusive – and these reasons do not involve discretion on the part of the licensing official. Littleton, Colo., City Code § 3-14-8.

[14] Analyzing the constitutionality of a permit requirement for a public forum, the Supreme Court has recently held that an ordinance that gives no discretion to the licensing official does not threaten to stifle free expression. *See Thomas v. Chi. Park Dist.,* 122 S. Ct. 775, 780-81 (2002). However, *Thomas* distinguishes *FW/PBS* on the grounds that "it involved a licensing scheme that target[ed] businesses purveying

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access to prompt judicial review is sufficient for licensing cases). Because the ordinance in dispute contained an explicit judicial review provision, the Eleventh Circuit held it constitutional. *Id.* at 1255, 1257.

Boss Capital draws a rational distinction between licensing cases and censorship cases. The purpose of Justice O'Connor's language distinguishing between these two categories, however, is most logically understood as an attempt at explaining why *Freedman*'s third safeguard – that the burden of going to court and the burden of proof must be on the censor – is not appropriate to the licensing context. *See FW/PBS,* 493 U.S. at 229-30 (concluding that the third *Freedman* requirement does not apply to licensing cases). If Justice O'Connor had intended to adopt a different judicial review requirement for licensing cases, she could have done so explicitly, just as she explicitly rejected the burden-shifting requirement.

Other circuits have held that the judicial review requirement of *Freedman* was not altered by *FW/PBS*. As the Sixth Circuit notes, Justice O'Connor "gave no indication that she was modifying the second requirement of prompt judicial review" in the licensing context. *Nightclubs,* 202 F.3d at 893. According to the Ninth Circuit, the *FW/PBS* plurality "took issue only with *Freedman*'s requirement that the censor bear the cost of going to court to obtain judicial review; otherwise, *FW/PBS* offered nothing different from *Freedman*'s concept of what 'judicial

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sexually explicit speech," *id.* at 780 n.2 (quotation omitted), and the Court did not overrule its earlier decision that the first two *Freedman* requirements must be applied in adult-business licensing cases.

review' meant." *Baby Tam,* 154 F.3d at 1102; *see also 11126 Baltimore Boulevard,* 58 F.3d at 999 (reaching the same conclusion). If the Court adopted the *Freedman* requirement without modification in *FW/PBS,* then the distinction between licensing and censorship is not relevant here.

Even if the rationale behind *Freedman* is specific to censorship cases, there is an equally valid rationale for requiring prompt judicial review in adult-business licensing cases. Although adult-business licensing ordinances are technically considered "content-neutral," *ZJ Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683, 686-88 (10th Cir. 1998), they are distinguishable from other content-neutral time, place, and manner restrictions insofar as they target "businesses purveying sexually explicit speech." *Thomas v. Chi. Park Dist.,* 122 S. Ct. at 780 n.2 (2002) (quoting *FW/PBS,* 493 U.S. at 224). A licensing official may have little or no discretion in reviewing an application, but he or she may be tempted nonetheless to overstep the bounds of the ordinance.

Adult businesses are controversial, and the possibility exists that licensing officials might allow their personal views on the morality of sexually explicit entertainment to sway a decision on an application. Given the strong feelings that adult businesses can engender, there must be a prompt judicial determination to ensure that licensing officials do not exceed their authority under the ordinance in their zeal to protect the local community. ZJ sells sexually explicit magazines and videocassette tapes, which are presumptively protected by the First Amendment, *see FW/PBS,* 493 U.S. at 224, and the danger that an ordinance like Littleton's may be improperly used as a subterfuge for censorship is too great to overlook the necessity for a prompt judicial determination.

In short, we are not persuaded by those circuits that have concluded that mere "access" to judicial review is sufficient in licensing cases. Following the Fourth, Sixth and Ninth Circuits, we hold that, in the event that an adult-business license is denied, *FW/PBS* requires a prompt final judicial *decision* regarding the validity of the denial. "[A] theoretical possibility of expeditious judicial review is not constitutionally sufficient." *Nightclubs,* 202 F.3d at 892. "While we trust state courts to exercise due diligence, we cannot be sure that a state judge . . . toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner." *Id.* Prompt judicial review, including a prompt final decision, must be assured in all First Amendment licensing cases in order for the second requirement of *Freedman* and *FW/PBS* to be satisfied. What constitutes a prompt judicial determination in the adult-business licensing context is to be determined by reference to the Supreme Court's jurisprudence following *Freedman. See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 561-62 (1975) (holding that a judicial review process lasting more than five months was not prompt).

Littleton's ordinance allows a party whose license has been denied to appeal to the Colorado district court under Colorado Rule of Civil Procedure 106(a)(4). This Rule allows an adverse decision regarding the license to be given expedited review in the trial court's discretion. *2354 Inc.,* 896 P.2d at 284 (citing Colo. R. Civ. P. 106(a)(4)(VIII)). Because this Rule does not assure that license decisions will be given expedited review, however, it does not save Littleton's ordinance. Accordingly, the order of the district court granting summary judgment for the City is reversed

to the extent that it held the judicial review procedure to be constitutionally sufficient.

V

Finally, ZJ attacks the location restrictions in Littleton's ordinance as unconstitutional because they do not provide reasonable alternatives of communication, as required by *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986).[15] It is the City's burden to demonstrate that its ordinance meets this requirement. *See ZJ Gifts,* 136 F.3d at 688.

Renton considered a local ordinance that restricted the location of adult businesses. 475 U.S. at 44. Content-neutral zoning ordinances, the Court held, are permissible so long as "reasonable alternative avenues of communication" are left open, *id.* at 53, a question that is answered through an analysis of how much land is available in which adult businesses may be located under the zoning system, *id.* at 53-54. In undertaking that analysis, the courts must examine what land is actually available, but

[15] In its reply and supplemental briefing, ZJ argued that the location restrictions in Littleton's ordinance should be viewed as "content-based" restrictions on speech subject to strict scrutiny. In particular, ZJ argues that the recent Supreme Court decision in *Thomas,* 122 S. Ct. 775 (2002), and Justice Kennedy's opinion in *City of Los Angeles v. Alameda Books, Inc.,* 122 S. Ct. 1728, 1739 (2002) (Kennedy, J., concurring in the judgment), support this claim. This court, however, has previously held that a nearly identical ordinance should be reviewed as a "content-neutral" regulation subject to intermediate scrutiny. *See ZJ Gifts,* 136 F.3d at 686-88. We see nothing in either *Thomas* or *Alameda Books* that requires reconsideration of our conclusion as to the applicable standard of review.

also must keep in mind that adult businesses must "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." *Id.* at 54.

How much land is sufficient to constitute "reasonable alternative avenues of communication" is a question that the *Renton* Court left open. In *Renton,* the ordinance left "520 acres, or more than five percent of the entire land area of" the city, open for adult businesses, with the land "in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." *Id.* at 53 (quotation omitted). The *Renton* Court determined that the ordinance "easily meets" the requirement of providing a "reasonable opportunity to open and operate an adult theater within the city." *Id.* at 54.

Under Littleton's ordinance, there are approximately one-hundred acres of land that are within industrial zones and outside the minimum distance from nearby schools, day care centers, and correctional facilities.[16] This land constitutes between 1.2 and 1.3% of the total acreage of the City of Littleton. At least one other court of appeals has found this proportion of land to be sufficient under

[16] ZJ argues that some of these parcels are unavailable because portions of the parcels are within five-hundred feet of schools, day care centers, and correctional facilities. However, as the record shows, the majority of these parcels are outside the distance limits. Under Littleton's ordinance, the distance limits are only violated if the exterior wall of the structure in which the adult business is located is within the minimum distance from the neighboring use. Thus, these parcels are available for use by an adult business as long as the business locates in the portions of the parcels where such uses are permitted.

Renton. See Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992).

ZJ argues that portions of this land are unavailable because specific parcels are (1) currently occupied by large-scale manufacturing uses, *see Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1531-32 (9th Cir. 1993), or (2) currently owned by governmental entities, *see Centerfold Club, Inc. v. City of St. Petersburg,* 969 F.Supp. 1288, 1305 (M.D. Fla. 1997).

First, we disagree with the notion that warehouses and other large-scale manufacturing uses must be excluded per se from any calculation of whether there is sufficient land for adult business uses. In *Renton* itself the Supreme Court noted the diversity of property that was available for adult business use under the ordinance – "industrial, *warehouse,* office, and shopping space," *Renton,* 475 U.S. at 53 (emphasis added) – in concluding that there was sufficient land available. Similarly, Littleton's ordinance leaves a diversity of different types of properties available for use by an adult business, including large-scale manufacturing and warehouse uses. Under *Renton,* there is no need to exclude those uses from our analysis.[17] While it may indeed be more difficult and more expensive for an adult-business owner to acquire and convert these types of properties, there is no requirement that those

[17] We add that we do not address a situation where all or nearly all properties consist of large-scale manufacturing and warehouse uses, such that the diversity of land uses described in *Renton* does not exist. In such a situation, the municipality may be "effectively denying" adult businesses "a reasonable opportunity to open and operate." *Renton,* 475 U.S. at 54.

businessmen must "be able to obtain sites at bargain prices." *Id.* at 54.

As for inclusion of the government-owned properties, we need not decide whether that is permissible under the *Renton* analysis. Even excluding those parcels that are government-owned according to evidence introduced by ZJ, there is sufficient property zoned for adult business uses to meet the requirements of *Renton*. ZJ submitted evidence identifying only one specific property – the Littleton City Shops between Belleview Avenue and Prentice Avenue, constituting twelve acres – as being owned by the government. Other properties mentioned by ZJ in its brief – a fire training center, a nature area, and the Arapahoe County Government Center – are not identified by parcel, nor does ZJ provide any information as to their total acreage. However, even giving ZJ the benefit of the doubt as to these additional properties, based on the information we can glean from the record, removing these properties would only reduce the total available area by approximately ten acres.[18] Thus, the total area available

[18] In reaching this conclusion, we draw the following inferences in ZJ's favor: Littleton's fire protection center and the abandoned city property are located in an industrial zone that comprises approximately eight acres near the intersection of Chenango and Vallejo Streets. We assume that all of those properties were used by both the fire protection center and the abandoned city property, and we remove them from our analysis. As for the Arapahoe Government Center, ZJ relies on the City's maps in the record as evidence regarding its location on "South Crestline Avenue." We can find only an ambiguous reference for a parcel south of West Crestline Avenue, which appears to occupy about two acres of the industrial zones. ZJ has provided us with absolutely no information from which an inference can be drawn regarding the specific location or acreage of Littleton's nature area.

excluding government properties would be about seventy-eight acres, or just under one percent of the total area of the City.

Moreover, excluding both the government properties to which ZJ objects as well as those properties that are implicated by the minimum distance requirements of the ordinance, the City has listed over twenty sites within the industrial districts that its real estate expert stated would be available for adult businesses. Given the small population of Littleton (forty-thousand people), and the fact that ZJ is the only adult business that is currently located in Littleton, this is a sufficient number of available sites. *See Diamond v. City of Taft*, 215 F.3d 1052, 1058 (9th Cir. 2000) (holding seven available sites sufficient where only one business sought to locate within the municipality), *cert. denied*, 531 U.S. 1072 (2001);[19] *see also Boss Capital*, 187 F.3d at 1254 (listing factors to be considered in analyzing whether there are sufficient sites for adult businesses, including geographical size of the locality, location of sites, number of adult businesses currently operating or seeking permission to operate, and population). We conclude that

[19] Where an adult-business zoning regulation prohibits the location of one adult business within a minimum distance of another one – as Littleton's ordinance does – some courts have required the analysis of the minimum number of sites to take into account those spacing requirements, dramatically reducing the potential number of sites. *See, e.g., Young v. City of Simi Valley*, 216 F.3d 807, 821 n.13 (9th Cir. 2000). ZJ has never argued that we should incorporate the spacing requirements into our analysis, and given that ZJ is the only adult business currently operating or seeking to operate in Littleton, such an adjustment would be inappropriate in the first place. *See Diamond*, 215 F.3d at 1057-58.

the ordinance meets the requirements of *Renton*,[20] and the section of the district court order dealing with the location requirements of Littleton's ordinance is affirmed.

VI

In sum, we conclude that ZJ has standing to challenge the pre-application and location requirements of the ordinance and the judicial review procedure. ZJ lacks standing, however, to challenge the ordinance as vague, attack the ordinance's license revocation and suspension provisions, or challenge the age and criminal history restrictions in the ordinance. As to the merits of ZJ's challenge, we hold that the judicial review procedure and pre-application requirements of Littleton's ordinance are unconstitutional, but that the location requirements of the ordinance are constitutional.

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[20] ZJ urges us to hold that the Colorado Constitution provides broader protections than the United States Constitution in this context. None of the cases cited by ZJ in support of this proposition, however, involves a challenge to adult-business licensing ordinances. *See Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991) (discussing plaintiffs' right to distribute political leaflets in a shopping mall); *People v. Ford*, 773 P.2d 1059, 1061 (Colo. 1989) (addressing the constitutionality of the Colorado obscenity statute); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 353 (Colo. 1985) (same). In analyzing a local ordinance regulating nude dancing, the Colorado Supreme Court relied almost exclusively on federal cases in determining that the ordinance did not violate the free speech protections of either the federal or state constitutions. *See 7250 Corp. v. Bd. of County Comm'rs*, 799 P.2d 917, 924-28 (Colo. 1990) (en banc). We have found no evidence that in this particular field of free speech jurisprudence the Colorado courts have interpreted the state constitution to provide greater protection than the federal Constitution.

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part.[21]

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[21] We grant the City's motions to file additional supplemental appendices.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 99-N-1696

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Plaintiff,

vs.

CITY OF LITTLETON, an incorporated home rule municipal corporation,

Defendant.

ORDER AND MEMORANDUM OF DECISION

(Filed Mar. 31, 2001)

This case involves numerous constitutional challenges to a city ordinance that regulates adult entertainment businesses. Plaintiff Z.J. Gifts alleges that Chapter 14 of the Littleton Municipal Code deprives it of its right to freedom of speech and due process secured by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, as well as Article II, Sections 10, 15 and 25 of the Colorado Constitution, in violation of 42 U.S.C.A. § 1983 (West 1994 & Supp. 2000). This matter is before the court on: (1) Defendant's "Motion for Summary Judgment" filed June 15, 2000; and (2) Plaintiff's "Brief in Support of Plaintiff's Cross Motion for Partial Summary Judgment and In Opposition to Defendant's Cross Motion for

Summary Judgment" filed July 24, 2000. Jurisdiction is based on 42 U.S.C.A. § 1983.

FACTS

1. General Background

Z.J. Gifts is a Colorado limited liability company doing business under the name "Christal's" at 6502 South Broadway in the City of Littleton. (Mem. Br. in Supp. of Def.'s Mot. for Summ. J., Statement of Facts ¶12 [filed June 15, 2000] [hereinafter "Def.'s Br."]; *admitted at* Br. in Supp. of Pl.'s Cross Mot. for Partial Summ. J. and in Opp'n to Def.'s Cross Mot. for Summ. J., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 12 [filed July 24, 2000] [hereinafter "Pl.'s Br."].) Defendant City of Littleton is a home-rule municipal corporation organized under the laws of the state of Colorado. (Pl.'s Br., Statement of Undisputed Facts ¶ 3; *admitted at* Def.'s Reply Br. in Supp. of Mot. for Summ. J. and Def's Resp. Br. in Opp'n to Pl.'s Cross-Mot. for Summ. J., Def.'s Resp. to Pl.'s Statement of Undisputed Facts ¶ 3 [filed Aug. 24, 2000] [hereinafter "Def.'s Reply"].)

On July 20 and August 3, 1993, the Littleton City Council held public hearings regarding the Ordinance ("Chapter 14") at issue in this case. (Def.'s Br., Statement of Facts ¶¶ 1, 2; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶¶ 1, 2.) At these hearings, city council members reviewed land use summaries from other cities that documented the adverse secondary impacts that adult entertainment establishments have on adjacent and nearby properties. (*Id.*, Statement of Facts ¶¶ 3, 9; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶¶ 3, 9.) The council members also

heard testimony regarding the deleterious effects that adult entertainment businesses have on surrounding businesses, property values, and crime rates. (*Id.*, Ex. A [Ordinance].) Based on these findings and others, the Ordinance was passed by a vote of council members on August 3, 1993. (*Id.*, Statement of Facts ¶ 11; *admitted in relevant part at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 11.)

The City of Littleton covers 7,860 acres of land, which are divided into residential, business, and industrial zones. (*Id.*, Statement of Facts ¶ 4; *admitted in relevant part at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 4.) Of the 7,860 acres in Littleton, 75.5% is zoned for residential use, 5.3% is zoned for business, and 1.3% is zoned for industrial use. (*Id.*, Statement of Facts ¶ 4; *admitted in relevant part at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 4.) Of the land that is zoned for business or industrial uses, 19.8% is zoned in the I-1 or I-2 districts. (*Id.*, Statement of Facts ¶ 4; *admitted in relevant part at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 4.) Plaintiff's business is located in the B-2 district, which is located in a business zone rather than an industrial zone. (Pl.'s Br., Statement of Undisputed Facts ¶ 4; *admitted at* Def.'s Reply, Def.'s Resp. to Pl.'s Undisputed Facts ¶ 4.)

2. Chapter 14

Section 3-14-1 of Chapter 14 states that "purpose and intent of this Chapter is to regulate adult businesses, to promote the health, safety, morals and general welfare of the citizens of the City, and establish reasonable and uniform regulations to prevent the deleterious location and concentration of adult businesses within the City,

thereby reducing or eliminating the adverse secondary effects from such adult businesses." (Compl. for Prelim. and Permanent Injunctive Relief, Declaratory Relief, Damages, and Att'ys Fees, Ex. A [Chapter 14] [filed Aug. 25, 1999] [hereinafter "compl."].)

Section 3-14-4 requires all persons who conduct an adult business to obtain an annual adult business license. (*Id.*, Ex. A [Chapter 14].) Section 3-14-8 requires the city clerk to approve or deny any application for an adult business license within thirty days of the date the application is filed with the city clerk. (*Id.*, Ex. A [Chapter 14].) Under section 3-14-8, the city clerk is compelled to deny a license application for eight detailed reasons:

1. The applicant is under the age of twenty-one years;

2. The applicant has made a false statement upon the application or has given false information in connection with an application;

3. The applicant or any holder of any class of stock, or a director, officer, partner or principal of the applicant has had an adult business license revoked or suspended anywhere within the State within one year prior to the application;

4. The applicant has operated an adult business which has determined to be a public nuisance under State law or this Code within one year prior to the application;

5. A corporate applicant is not in good standing or authorized to do business in the State; or

6. The applicant is overdue in the payment to the City of taxes, fees, fines or penalties assessed against him/her or imposed against him/her to an adult business;

7. The applicant has not obtained required sales tax license;

8. The applicant has been convicted of a specified criminal act.

(*Id.*, Ex. A [Chapter 14].) In the event the city clerk denies a license, the city clerk must make written findings of fact stating the reasons for the denial. (*Id.*, Ex. A [Chapter 14].) An applicant who has been denied a license has the right to a hearing before the city manager within thirty days of the denial. (*Id.*, Ex. A [Chapter 14].) The order of the city manager is final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4). (*Id.*, Ex. A [Chapter 14].)

3. Procedural History

On August 25, 1999, plaintiff filed a six-count complaint against defendant for alleged violations of its First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. (Compl. ¶ 27.) Plaintiff alleges that Chapter 14 of the Littleton Municipal Code is unconstitutional for a variety of reasons. (*Id.* ¶¶ 26-54.) Plaintiff seeks a declaration that Chapter 14 is unconstitutional, a permanent injunction prohibiting Littleton from enforcing Chapter 14, and damages. (*Id.*, Prayer for Relief.)

On June 15, 2000, defendant moved for summary judgment. (Mot. for Summ. J. [filed June 15, 2000].) Defendant contends that Chapter 14 of the Littleton Municipal Code is not unconstitutional because it is a

legitimate time, place and manner restriction designed to serve a substantial governmental interest and it does not unreasonably limit alternative avenues of communication. (Def.'s Br. at 17-28.) Defendant also argues that plaintiff is an adult business store as defined under Chapter 14 and is, therefore, subject to the provisions of Chapter 14, (*Id.* at 10-17.)

On July 24, 2000, plaintiff moved for summary judgment on a variety of grounds. (Pl.'s Br. at 1.) By way of illustration and not limitation, plaintiff argues that Chapter 14 is a content-based regulation and a prior restraint on speech subject to strict judicial review. and that Chapter 14 lacks procedural safeguards required under the First Amendment case law. (*Id.* at 6-10, 10-29). Plaintiff also argues that it is not an adult entertainment establishment as defined by Chapter 14. (*Id.* at 39-47.)

ANALYSIS

1. Legal Standard

Under rule 56(c), the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). "Once the moving party meets this burden,

the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Celotex Corp.*, 477 U.S. at 325, 106 S. Ct. at 2554). The nonmoving party may not rest solely on the allegations in his or her pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324, 106 S. Ct. at 2553; Fed. R. Civ. P. 56(e). The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 [10th Cir. 1990]).

2. *Interpreting Chapter 14*

Initially, I must determine whether Z.J. Gifts is an adult entertainment business as defined by Chapter 14. Section 3-14-2 defines an adult bookstore or novelty store as a commercial establishment which devotes a "significant or substantial" portion of its stock-in-trade or interior floor space to the sale, rental or viewing of items which are characterized by the depiction or description of specified sexual activities or specified anatomical areas. (*Id.*, Ex. A [Chapter 14].) Section 3-14-2 defines specified anatomical areas as "(a) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areolae; or (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered." (*Id.* ¶ 12; *admitted at* Answer and Jury Demand ¶ 6 [filed Sept. 15, 1999] [hereinafter "Answer"].) Section 3-14-2 defines specified sexual activities:

> (a) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts; (b) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (c) masturbation, actual or simulated; (d) human genitals in a state of sexual stimulation, arousal, or tumescence; or (e) excretory functions as part of or in connection with any of the activities set forth in subsections (a) through (d) of this definition.

(*Id.* ¶ 13; *admitted at* Answer ¶ 6.)

The term "significant or substantial" is not defined by the Littleton Municipal Code. (*Id.* ¶ 18; *admitted in relevant part at* Answer ¶ 9.) Plaintiff contends that Littleton's failure to define the term "significant and substantial" renders Chapter 14 unconstitutionally vague and overbroad. (Pl.'s Br. at 39-47.) Alternatively, plaintiff requests that I define the term "significant and substantial" in such a manner so that plaintiff does not fall under its definition. (*Id.*) After reviewing the case law and evidence in this case, I find that plaintiff is an adult entertainment establishment subject to the regulations under Chapter 14.

(a) Void for Vagueness Doctrine

Under the void for vagueness doctrine, a plaintiff may challenge a legislative enactment by arguing that it does not provide adequate notice of proscribed conduct. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 56, 96 S. Ct. 2440, 2446 (1976); *15192 Thirteen Mile Road, Inc. v. City*

of Warren, 626 F. Supp. 803, 818 (E.D. Mich. 1985). This doctrine serves a three-fold purpose. *15192 Thirteen Mile Road*, 626 F. Supp. at 818. First, by requiring legislatures to provide adequate notice of prohibited conduct, the doctrine ensures that innocent citizens will not unknowingly become subject to the imposition of criminal penalties. *Greyned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972). Second, the vagueness doctrine ensures that legislative bodies will not improperly delegate authority or discretion to law enforcement officials. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839 (1972). By requiring legislatures to provide minimal guidelines to govern law enforcement, the vagueness doctrine protects against the imposition of criminal sanctions based on personal predilections of individual policemen, prosecutors or judges. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1859 (1983). Third, the vagueness doctrine prevents vague laws from chilling First Amendment expression. *15192 Thirteen Mile Road*, 626 F. Supp. at 818.

An ordinance must "delineate its reach in words of common understanding so that ordinary people can understand what conduct is prohibited." *Cameron v. Johnson*, 390 U.S. 611, 616, 88 S. Ct. 1335, 1338 (1968); *Acorn v. City of Tulsa, Okla.*, 835 F.2d 735, 740 (10th Cir. 1987). In *Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242 (1974), Justice Powell wrote that:

> [t]he doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement. Where a statute's literal scope, unaided by a narrowing

> state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

Id. at 573, 94 S. Ct. at 1247. The general test for vagueness applies with particular force in review of laws dealing with speech. *15192 Thirteen Mile Road*, 626 F. Supp. at 818. "Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760 (1976) (quoting *Smith v. California*, 361 U.S. 147, 151, 80 S. Ct. 215, 217 [1959]).

The void for vagueness doctrine focuses on whether an ordinance is drafted in such a manner that the very existence of the ordinance may cause persons not before the court to refrain from engaging in constitutionally protected speech. *Young*, 427 U.S. at 59, 96 S. Ct. at 2447; *Broadrick v. Oklahoma*, 413 U.S. 601, 611-14, 93 S. Ct. 2908, 2915-17 (1973). The vagueness doctrine is justified by the overriding importance of maintaining a free and open market for the interchange of ideas. *Id.*, 96 S. Ct. at 2447. With these principles in mind, I now address plaintiff's argument that Chapter 14 is void for vagueness because Littleton failed to define the term "significant or substantial."

In *15192 Thirteen Mile Road*, the plaintiff made a similar challenge to a Detroit ordinance that used the term "significant or substantial." 626 F. Supp. at 818. The court held that the term significant or substantial is reasonably specific and precise, "bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary." *Id.* at 819 (quoting *Hart Book Stores,*

Inc. v. Edminsten, 612 F.2d 821, 833 [4th Cir. 1983]). The court noted that the term substantial has been used in numerous statutory schemes. *Id.* (noting that the term "substantial" appears in the United States Code roughly 1157 times and "substantial portion" appears fifty-one times in the United States Code); *Busch v. Service Plastics, Inc.*, 261 F. Supp. 136, 141 (N.D. Ohio 1966).

I am persuaded by the court's opinion in *15192 Thirteen Mile Road* that the term "significant or substantial" is constitutionally precise. Chapter 14 clearly defines the conduct, services and activities that it considers to be adult in nature. The determination of how many of these services are required for one to become an adult entertainment business is a difficult line-drawing problem that is best resolved by the courts on a case-by-case basis. Furthermore, Chapter 14 is not so vague that its very existence would cause persons not before the court to refrain from engaging in constitutionally protected speech. *Id.*, 96 S. Ct. at 2447. The free and open market for the interchange of ideas in Littleton has not been affected by the clarity of Chapter 14.

Even if I were inclined to strike Chapter 14 as unconstitutional because of Littleton's failure to define the term significant or substantial, which I am not, the Supreme Court decision in *Young* prevents me from doing so. In *Young*, the plaintiffs made a similar challenge to a zoning ordinance as plaintiff has made in this case. The plaintiffs in *Young* did not attack the specificity of the definition of "specified sexual activities" or "specified anatomical areas," but rather argued that they could not determine how much of the described activities may be permissible before it falls within the scope of the ordinance. *Young*, 427 U.S. at 56, 96 S. Ct. at 2446. The Supreme Court

denied the plaintiffs challenge on two grounds. *Id.* at 56-57, 96 S. Ct. at 2446. First, the Court stated that it was unnecessary to consider the validity of the plaintiffs' arguments, for even if there may be some uncertainty about the effect of the ordinance on other litigants, the ordinance unquestionably applied to the plaintiffs. *Id.*, 96 S. Ct. at 2446. The Supreme Court noted that the plaintiffs offered adult fares on a regular basis, and therefore, any element of vagueness in these ordinances did not affect the plaintiffs. *Id.*, 96 S. Ct. at 2446. Second, the court stated that, in any event, the plaintiffs did not have standing to challenge the constitutionality of the ordinance because the plaintiffs' rights were not affected. *Id.*, 96 S. Ct. at 2446.

Similarly, in this case, it is unnecessary to address plaintiff's void for vagueness argument because even if there may be some uncertainty about the effect of the ordinance on other litigants, the ordinance unquestionably applies to plaintiffs. Plaintiff admits that it prohibits children under the age of eighteen from entering its store. (Def.'s Br., Statement of Facts ¶ 31; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 31.) Accordingly, plaintiff obviously considers itself to be in the business of selling goods and services for adult use only. Furthermore, plaintiff admits that, at the very least, thirty-three percent of its inventory is adult in nature.[1] (*Id.*, Statement of Facts

[1] Plaintiff's estimate that thirty-three percent of its business is adult or sexual in nature appears to be far below the actual figure. Defendant has submitted evidence suggesting that the portion of plaintiff's inventory that is sexual and adult in nature is closer to fifty percent. (Def.'s Br., Ex. D [Video], Ex. E [Photographs], Ex. F [Inventory List], Ex. G [Expert Reports].) After reviewing the photographs

(Continued on following page)

¶ 32; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 32.) One-third of a store's inventory can hardly be considered insubstantial. Accordingly, I find that Chapter 14 unquestionably applies to plaintiff in this case.

Furthermore, plaintiff does not have standing to challenge the precision of the language contained within Chapter 14. In *Young*, the Supreme Court stated that the plaintiffs did not have standing to challenge the constitutionality of the ordinance because the plaintiffs' rights were not affected. *Id.*, 96 S. Ct. at 2446. The court stated that if the "statute's deterrent effect on legitimate expression is not both real and substantial, and if the statute is readily subject to a narrowing construction by the state courts, the litigant is not permitted to assert the right of third parties." *Id.*, 96 S. Ct. at 2446. Chapter 14 is not a total ban on operating adult entertainment businesses in Littleton, nor does it have a real and substantial deterrent effect on legitimate expression. Furthermore, the "significant or substantial" term in Chapter 14, at the very least, is readily subject to a narrowing construction by the state courts of Colorado. Accordingly, consistent with the Supreme Court's opinion in *Young*, I find that plaintiff does not have standing to challenge the constitutionality of Chapter 14 under the void for vagueness doctrine.

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taken of the display cases in plaintiff's store and the video segment touring the store, I find plaintiff's argument that it is not an adult entertainment establishment frivolous at best. To define plaintiff as anything other than an adult entertainment business would be absurd and totally devoid of any basis on the record.

(b) Void for Over breadth Doctrine

Unlike the void for vagueness doctrine, the over-breadth doctrine is not rooted in due process notions of fair notice. *15192 Thirteen Mile Road*, 626 F. Supp. at 821. Rather, its purpose is to ensure that governmental actions "to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* (quoting *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S. Ct. 1302, 1313 (1958). A plaintiff has standing to challenge a legislative enactment on over-breadth grounds as long as the legislation is capable of reaching constitutionally protected speech. *Broadrick*, 413 U.S. 601, 93 S. Ct. 2908. "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect . . . cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Alderman v. U.S.*, 394 U.S. 165, 174-75, 89 S. Ct. 961, 970-71 (1969).

Although the two doctrines are conceptually distinct, plaintiff has largely intertwined its vagueness and over breadth arguments. Because plaintiff's argument most closely resembles a void-for-vagueness challenge, I find that the crux of plaintiff's challenge to Chapter 14 is that it is impermissibly vague. Nevertheless, even if plaintiff meant to challenge Chapter 14 on the ground that it is over-broad, this argument must fail. Littleton clearly specified the conduct that Chapter 14 regulates. The terms "specified sexual activities" and "specified anatomical areas" are clearly defined under Chapter 14. Littleton has not attempted to regulate conduct under Chapter 14 that

is outside the scope of its constitutional authority. It is undisputed that Littleton has the power to regulate the time, place, and manner which people operate an adult entertainment business in Littleton. *Young,* 427 U.S. at 56, 96 S. Ct. at 2446. As for the term "significant or substantial," the courts can prevent the over-broad application of Chapter 14 that otherwise might arise from an over-inclusive interpretation of the term "significant or substantial" simply by giving the term its reasonable and intended meaning.

(c) "Significant or Substantial"

Plaintiff requests that I define the term "significant or substantial" in a manner such that it does not fall under the definition of an adult entertainment business. In support of its argument, plaintiff emphasizes that it sells cross-over or secondary products in conjunction with its undeniably predominant stock of adult goods. Despite plaintiff's attempt to portray itself as merely a retail store that also sells adult products, I find that, under the facts of this case, plaintiff is an adult entertainment business as defined under Chapter 14 of the Littleton Municipal Code. As I indicated above, thirty-three percent is a significant or substantial portion of a store's inventory. Furthermore, after reviewing the photographs taken of the display cases in plaintiff's store and the video segment touring the store, I find plaintiff's argument that a significant or substantial

portion of its inventory is not adult in nature frivolous at best.[2]

3. Constitutional Challenges to Chapter 14

Plaintiff brings this suit under section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States], shall be liable to the party injured . . .

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[2] It appears as though plaintiff in this case was also the plaintiff in *Z. J. Gifts v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998). In *Z. J. Gifts*, the issue of whether Z. J. Gifts was operating an adult entertainment business was uncontested. *Id.* at 686 (stating "given the uncontroverted sexual nature of Z. J. Gifts' business, we are convinced the city has met its burden"). I am disturbed by the frivolous and incredulous arguments asserted by plaintiff in this case. I remind counsel of the provisions of Fed. R. Civ. P. 11:

> By presenting to the court . . . a . . . written motion, . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

42 U.S.C.A. § 1983. Plaintiff alleges that Chapter 14 of the Littleton City Code deprives plaintiff of its right to freedom of speech and due process secured by the First, Fifth, Ninth and Fourteenth Amendments to the Untied States Constitution. (Compl. ¶¶ 27, 30.)

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST amend. I. The Fourteenth Amendment makes that prohibition applicable to the State of Colorado. *Meyer v. Grant,* 486 U.S. 414, 420, 108 S. Ct. 1886, 1891 (1988). "The freedom of speech and of the press which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." *Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S. Ct. 736, 740 (1940).

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1034, 1308 (1957). The freedom of speech guaranteed by the Constitution embraces the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. *Grant*, 486 U.S. at 420, 108 S. Ct. at 1891. Courts have recognized that governmental limitations which limit expressive interests strike "[a]t the heart of the First Amendment." *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 2458 (1994). Like most rights, however, plaintiffs' first amendment rights are not absolute. *Buckley v. American*

Constitutional Law Foundation, Inc., 525 U.S. 182, 191, 119 S. Ct. 636, 642 (1999); *Buckley v. Valeo*, 424 U.S. 1, 45, 96 S. Ct. 612, 647 (1976); *American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092, 1097 (10th Cir. 1997); *Krislov*, 226 F.3d at 859. Courts are "aware that First Amendment doctrine must be informed by the complex tangle of social, political, and cultural interests in limiting speech as well as protecting it, for the tension between the individual rights and community needs is at the core of every First Amendment issue." *Z. J. Gifts v. City of Aurora*, 136 F.3d 683, 685 (10th Cir. 1998).

Plaintiff makes several unsubstantiated arguments in support of its contention that Chapter 14 is unconstitutional. (Pl.'s Br. at 10-49.) Rather than address each and every unsubstantiated argument plaintiff makes, I will briefly discuss the case law that dictates the result in this case. Despite plaintiff's attempts to escape the grips of Chapter 14, I find that Chapter 14 is constitutional and applies to plaintiff in this case.

a. Chapter 14 Zoning Regulations

As an initial matter, I must determine whether Chapter 14 is a content-based or a content-neutral zoning regulation. Content-based restrictions on speech – those which suppress, disadvantage, or impose differential burdens upon speech because of its content – are subject to the most exacting scrutiny. *Turner*, 512 U.S. at 642, 114 S. Ct. at 2459; *Z. J. Gifts*, 136 F.3d at 685. The Supreme Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 45, 106 S. Ct.

925, 928 (1985); *Carey v. Brown*, 447 U.S. 455, 462-63, 100 S. Ct. 2286, 2291 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 2289 (1972). Conversely, content-neutral regulations pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue because they are unrelated to the content of the speech. *Turner*, 512 U.S. at 642, 114 S. Ct. at 2459; *Z. J. Gifts*, 136 F.3d at 685. Content-neutral regulations are accordingly subject to intermediate scrutiny. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3068-69 (1984); *Z. J. Gifts*, 136 F.3d at 685. Content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *City of Renton*, 475 U.S. at 45, 106 S. Ct. at 928; *Clark*, 468 U.S. at 293, 104 S. Ct. at 3069; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976).

In determining whether an ordinance is content-neutral and subject to intermediate scrutiny, the city's purpose in enacting the ordinance is the controlling consideration. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989); *Z. J. Gifts*, 136 F.3d at 685-86. If the regulation "serves purposes unrelated to the content of expression it is considered neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 791, 109 S. Ct. at 2754; *City of Renton*, 475 U.S. at 47-48, 106 S. Ct. at 928-29; *Z. J. Gifts*, 136 F.3d at 686. The city may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. *Mosley*, 408 U.S. at 95-96, 92 S. Ct. at 2289-90. On the other hand, however, "[i]t is a familiar principle of

constitutional law that [the Supreme Court] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 1683 (1968).

Despite plaintiff's attempt to subject Chapter 14 to strict judicial scrutiny, the Supreme Court and the Tenth Circuit have made it abundantly clear that ordinances such as the one in this case are not subject to strict scrutiny. *See City of Renton*, 475 U.S. at 45, 106 S. Ct. at 928; *Clark*, 468 U.S. at 293, 104 S. Ct. at 3069; *Young*, 427 U.S. at 52, 96 S. Ct. at 2442; *Z. J. Gifts*, 136 F.3d at 685-86. The Supreme Court has long held that city zoning ordinances which place limits on the location of adult uses are valid exercises of the city's police powers. *Young*, 427 U.S. at 62-63, 96 S. Ct. at 2448-49. Though such regulations treat adult uses differently from other uses based on their sexually explicit nature, they are designed to prevent crime, maintain property values, and preserve the equality of urban life. *City of Renton*, 475 U.S. at 48, 106 S. Ct. at 929. So long as cities do not use "the power to zone as a pretext for suppressing expression, attempts to regulate the adverse effects associated with sexually oriented businesses are properly classified as content-neutral." *Z. J. Gifts*, 136 F.3d at 686 (quoting *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932). Accordingly, because ordinances zoning adult uses are intended to curb the secondary effects of those uses on surrounding communities and burden free speech interests only incidentally, they are generally reviewed as content-neutral regulations subject to a less stringent standard of review. *Id.*

Properly analyzed as a content-neutral regulation, Littleton's zoning ordinance survives constitutional scrutiny if Littleton can establish that the ordinance is

narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication. *See City of Renton*, 475 U.S. at 45, 106 S. Ct. at 927-28. For the following reasons, I hold that Chapter 14 is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication.

(i) Significant Governmental Interest

The Supreme Court has long held that Littleton's stated interests in circumscribing the adverse secondary effects of sexually oriented businesses must be accorded high respect. *See City of Renton*, 475 U.S. at 45, 106 S. Ct. at 928; *Clark*, 468 U.S. at 293, 104 S. Ct. at 3069; *Young*, 427 U.S. at 52, 96 S. Ct. at 2442; *Z. J. Gifts*, 136 F.3d at 685-86. The record clearly establishes that the City of Littleton intended to regulate the harmful secondary effects of sexually oriented businesses. (Def.'s Br., Ex. A [Chapter 14, attach. 1 (Transcript of City Council Hearing on August 3, 1993), attach. 2 (Case Law Summaries Reviewed by City Council)].) The city council reviewed several land use summaries which found that adult businesses increase crime rates, lower property values, and reduce the quality of life in a community. (Def.'s Br., Statement of Facts ¶ 3; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 3.) Accordingly, I find that Littleton has a significant governmental interest in regulating the time, manner and place in which adult entertainment establishments operate their business.

Furthermore, Littleton need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually

transmitted diseases before it regulates those businesses. *Z. J. Gifts,* 136 F.3d at 687. Littleton may, and in fact did, rely on the experience of other cities to determine whether the harm presented by sexually oriented businesses are real and should be regulated. *Id.* Moreover, Littleton need only rely upon evidence reasonably believed to be relevant to the problem that the city addresses. *City of Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931. If Littleton can show that the ordinance affects that category of businesses shown to produce the unwanted secondary effects, the ordinance will stand. *Id.* at 52, 106 S. Ct. at 931. Based on my review of the record, I find that Littleton enacted Chapter 14 to regulate the secondary effects of adult businesses, and that Littleton has a significant governmental interest in regulating these secondary effects.

(ii) Narrowly Tailored

Time, place and manner regulations must be narrowly tailored, but "need not be the least restrictive or least intrusive means of doing so." *Rock Against Racism*, 491 U.S. at 798, 109 S. Ct. at 2757-58. "So long as the means chosen are not substantially broader than necessary, an ordinance is narrowly tailored if the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *Id.* at 799, 109 S. Ct. at 2758-59. It is not the court's function to appraise the wisdom of the city's decision. *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931. Because legislative bodies are entitled to reasonable inferences suggested by the legislative record before them, the court simply determines whether the ordinance affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects the city seeks to regulate. *Turner*, 512

U.S. at 666, 114 S. Ct. at 2471. Courts must allow cities like Littleton a reasonable opportunity to experiment with solutions to serious problems. *Young*, 427 U.S. at 71, 96 S. Ct. at 2453.

Based on evidence already cited herein, I find that Littleton reasonably believes that adult entertainment businesses produce at least some of the unwanted secondary effects the city seeks to regulate, and that Chapter 14 is narrowly tailored to eliminate or minimize the secondary effects of adult entertainment businesses.

(iii) Ample Alternative Avenues of Communication

The First Amendment requires only that Littleton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult entertainment business within the city. *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 930. Plaintiff cannot dispute that it has a reasonable opportunity to operate its business in Littleton. Chapter 14 is not a total ban on adult businesses. Sexually oriented businesses may locate within the city's industrial zone, which comprise approximately 1.3% of the city's land. *See Lakeland Lounge of Jackson, Inc. v. City of Jackson,* 973 F.2d 1255, 1260 (5th Cir. 1992) (holding that 1.2% of the land constitutes reasonable alternative avenues of communication) *cited with approval in Z. J. Gifts*, 136 F.3d at 688. Furthermore, there is not another adult entertainment business in the City of Littleton. (Def.'s Bar., Statement of Facts ¶ 35; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 35.) Accordingly, the restriction under Chapter 14 prohibiting plaintiff from operating an adult entertainment business within one

thousand feet of another adult entertainment business does not restrict the use of the land within the 1.3% zoned for adult uses.

It is clear from the record that Littleton has not used the power to zone as a pretext for suppressing expression, but rather has sought to make some areas available for adult entertainment businesses and their patrons, while at the same time preserving the quality of life in the community at large by preventing those businesses from locating in other areas. Plaintiff has the opportunity to operate its business in Littleton, just not in the B-2 district in which it is presently located. Accordingly, I find that Chapter 14 leaves open ample alternative channels of communication.

(b) Chapter 14 Licensing Regulations and Prior Restraints

Pursuant to Littleton's police powers, Littleton may require a party to obtain a license prior to operating an adult entertainment business. *Young*, 427 U.S. at 71, 96 S. Ct. at 2453. Whether Littleton's licensing regulations pass constitutional muster, however, depends largely on whether Chapter 14 can be characterized as a prior restraint on protected speech. *Id.* at 71, 96 S. Ct. at 2453. While prior restraints are not unconstitutional *per se*, any system of prior restraint bears a heavy presumption against its constitutional validity. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224, 110 S. Ct. 596, 604 (1990).

Cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. *FW/PBS*, 493 U.S. at 224, 110 S. Ct. at 604 (1990). First, a scheme

that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 2143 (1988). "It is settled by a long line of recent decisions of [the Supreme Court] that an ordinance which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon enjoyment of those freedoms." *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S. Ct. 935, 938-39 (1969).

Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. *Freedman v. State of Md.*, 380 U.S. 51, 57, 85 S. Ct. 734, 738 (1965). A licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure the prompt issuance of the license. *FW/PBS*, 493 U.S. at 226, 110 S. Ct. at 605. In *FW/PBS*, the Supreme Court held that two procedural safeguards are necessary to ensure the expeditious decision-making by a licensor: (1) the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained; and (2) there must be the possibility of prompt judicial review in the event that the license is erroneously denied. *Id.*, 493 U.S. at 226, 110 S. Ct. at 605.

Based on my review of the record, I find that Chapter 14 meets both of these requirements, is not a prior restraint on protected speech, and is, therefore, constitutional. First, Chapter 14 identifies eight specific reasons

which require the city clerk to deny a license application. (Def.'s Br., Ex. A [Chapter 14, Section 3-14-8].) Accordingly, the Littleton city clerk does not have unbridled discretion to approve or deny a license application. Second, Chapter 14 clearly requires the city clerk to either approve or deny a license application within thirty days of receiving the application, and also provides for prompt judicial review of license denials. (*Id.*, Ex. A [Chapter 14, Section 3-14-8].) In the event the city clerk denies a license, Chapter 14 requires the clerk to make written findings of fact stating the reasons for the denial. (*Id.*, Ex. A [Chapter 14, Section 3-14-8].) If the applicant is not satisfied with the city clerk's findings, the applicant, upon request, has a right to a hearing before the city manager within thirty days of the clerk's decision. (*Id.*, Ex. A [Chapter 14, Section 3-14-8].) The order of the city manager is a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4). *See City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 284 (Colo. 1995) (holding that Colorado Rules of Civil Procedure 106(a)(4) provides "adequate procedural safeguards and an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial.")

Based on the foregoing, I hold that Chapter 14 is constitutional as it is applied to plaintiff in this case. Accordingly, I deny plaintiff's motion for summary judgment and grant defendant's motion for summary judgment.

3. Conclusion

Based on the foregoing, it is therefore

ORDERED as follows:

1. Defendant's motion for summary judgment (#27) is GRANTED.

2. Plaintiff's motion for partial summary judgment (#33) is DENIED.

3. Defendant shall have its costs upon submission of a bill of costs in accordance with D. C. Colo. L. R. 54.1.

* * *

6. This case is hereby DISMISSED.

Dated this 30 day of March 2001.

BY THE COURT:
/s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-N-1696

CERTIFICATE OF MAILING

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on March 30, 2001, was served on ~~April~~ March 31, 2001, by hand delivery, where a "D.C." box number or asterisk is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

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Magistrate Judge O. Edward Schlatter*

JAMES R. MANSPEAKER,
CLERK

By /s/ Edward Butler
Deputy Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Z. J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company, doing business as Christal's, Plaintiff-Appellant, v. CITY OF LITTLETON, an Incorporated Home Rule Municipal Corporation, Defendant-Appellee.	No. 01-1220

ORDER
Filed February 5, 2003

Before **TACHA**, Chief Judge, **BRORBY**, Senior Circuit Judge, **SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN** and **MCCONNELL**, Circuit Judges.

Appellee's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. A poll was requested and a majority of the active

judges voted to deny rehearing en banc. Judges Tacha, O'Brien, and McConnell voted to grant rehearing en banc.

Entered for the Court,
PATRICK FISHER, Clerk

By /s/ Karen Phillips
Deputy Clerk

Fed. R. Civ. P. RULE 106. FORMS OF WRITS ABOLISHED

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state,

but if the district attorney declines so to do, it may be brought upon the relation and complaint of any person. The Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdictions or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within twenty days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to place before the Court. The cost of preparing the record shall be advanced by the plaintiff, except that the Court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the Court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the Court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within forty days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within forty days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within thirty days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within fifteen days after service of the answer brief.

(VIII) The Court may accelerate or continue any action which, in the discretion of the Court, requires acceleration or continuance.

(IX) In the event the Court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of this action, the Court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and

such amendment shall relate back to the date of filing of the original complaint.

Amended eff. Jan. 1, 1986.

CITY OF LITTLETON, COLORADO

ORDINANCE NO. 27

Series of 1993

INTRODUCED BY COUNCILMEMBERS: EMLEY AND REYNOLDS

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO, CONCERNING ZONING AND PERFORMANCE REQUIREMENTS FOR ADULT ENTERTAINMENT ESTABLISHMENT

WHEREAS, adult businesses in the City of Littleton would require special supervision from public safety and health agencies in order to protect and preserve the health, safety and welfare of the patrons of such businesses as well as the citizens of the City;

WHEREAS, the City Council and staff have reviewed land use studies or summaries concerning the secondary effects of adult businesses in other cities around the United States including, but not limited to, Garden Grove, California (1991); Phoenix, Arizona (1986); Minneapolis, Minnesota (1980); Houston, Texas (1983); Indianapolis, Indiana (1984); Amarillo, Texas (1977); Los Angeles, California (1977); Cleveland, Ohio (1977); Austin, Texas (1986); Seattle, Washington (1989); Oklahoma City, Oklahoma (1986); Beaumont, Texas (1982); and Whittier, California (1978);

WHEREAS, from a review of these studies and surveys and testimony heard, there is convincing documented evidence that adult businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing among other adverse

secondary effects, increased crime a depreciation of property values;

WHEREAS, it is recognized that adult businesses, due to their nature, have serious objectionable operational characteristics, particularly when they are operating in close proximity to each other, thereby contributing to crime, lower property values, urban blight and downgrading of the quality of life in the adjacent area;

WHEREAS, the Council finds that adult businesses are frequently used for sexual liaisons of a casual nature and unlawful sexual activities including prostitution;

WHEREAS, increased crime and unhealthy conduct tend to accompany, concentrate around and be aggravated by adult businesses including, but not limited to, prostitution, pandering, exposing minors to harmful materials, possession and distribution of obscene materials and child pornography, possession and sale of controlled substances and violent crimes against persons and property;

WHEREAS, concern over sexually transmitted diseases, including AIDS, is a legitimate health concern of the City which demands reasonable regulation of adult business in order to protect the health and well being of the citizens;

WHEREAS, the City Council has considered in part, each of the following matters:

(a) areas within close walking distance of single and multiple family dwellings should be free of adult business uses;

(b) areas where children could be expected to walk, patronize, or frequent should be free of adult business uses;

(c) adult business uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks or other public facilities and schools;

(d) the image of the City as a pleasant attractive place to reside will be adversely affected by the presence of adult business uses in close proximity to residential land uses, churches, parks and other public facilities, and schools;

(e) adult business uses should be regulated by zoning to separate them from other dissimilar or incompatible uses just as any other land use should be separated from uses with characteristics different or incompatible from itself;

(f) residents of the City and persons who are non-residents but come to the City for shopping and other commercial needs will move from the community or shop elsewhere if adult business are allowed to locate in close proximity to residential uses, churches, parks, and other public facilities, and schools;

(g) no evidence has been presented to show that the location of adult businesses within the commercial areas of the City will improve the commercial viability or quality of life of the community;

WHEREAS, zoning, licensing and other police power regulations are legitimate reasonable means of accountability to ensure that the operators of adult businesses comply with reasonable regulations and that such businesses are located in places that minimize the adverse secondary effects which historically have accompanied their operation;

WHEREAS, the Council finds that there would be a deterioration in the quality of businesses which chose to operate in and around adult businesses;

WHEREAS, the Council desires to minimize and control these adverse secondary effects and thereby protect the health, safety and welfare of the citizens by protecting the citizens from increased crime; preserving the quality of life, property values and the character of neighborhoods and businesses; deterring the spread of urban blight; and protecting against the spread of communicable and social diseases;

WHEREAS, the Council has considered the decisions of the United States Supreme Court and the Colorado Supreme Court regarding regulation of adult businesses, including but not limited to, *Young* v. *American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) *reh. denied* 429 U.S. 873; *Renton* v. *Playtime Theatres*, 475 U.S. 41 (1986) *reh. denied* 475 U.S. 1132; *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215 (1990); *Barnes* v. *Glen Theatre*, ___ U.S. ___, 111 S. Ct. 2456 (1991); *7250 Corp.* v. *Board of County Cm'rs*, 799 P.2d 917 (Colo. 1990); and *Regency Services* v. *Board of County Com'rs*, 819 P.2d 1049 (Colo. 1991);

WHEREAS, the Council has determined that locational criteria alone do not adequately protect the health, safety and general welfare of the people of the City, and thus certain requirements with respect to the ownership and operation of adult businesses are in the public interest;

WHEREAS, the Council, consistent with limitations on the sale of alcohol, further finds that restricted hours of operation will further prevent the adverse secondary effects of adult business;

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment or the Colorado Constitution, but to enact a content neutral ordinance which addresses the adverse secondary effects of adult businesses; and

WHEREAS, it is not the intent of the Council to condone or legitimize the distribution of obscene material, and the Council recognizes that state law prohibits the distribution of obscene materials and expects and encourages law enforcement officials to enforce state obscenity statutes against such illegal activities in the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Title 10, Chapter 1, Section 2 of the Littleton City Code, the definition of "Adult Entertainment", is hereby repealed:

Section 2: Title 10, Chapter 8, Section 2, Subsection (D) of the Littleton City Code is hereby repealed.

Section 3: Title 10, Chapter 3, Section 2, Land Use category 11.14 of the Littleton City Code is hereby amended to read:

| | | |

3-14-4: License Required – Fee
3-14-5: License Application
3-14-6: Application Fee
3-14-7: Investigation
3-14-8: Approval/Denial of License
3-14-9: Term of License
3-14-10: License Renewal
3-14-11: Suspension or Revocation of License
3-14-12: Display – Transferability – Change of Ownership – Change
3-14-13: Manager – Change of Manager
3-14-14: Hours of Operation
3-14-15: Standards of Conduct
3-14-16: Age Restriction
3-14-17: Lighting Requirements
3-14-18: Right of Entry
3-14-19: Exemptions Generally

3-14-1: PURPOSE

The purpose and intent of this chapter is to regulate adult businesses to promote the health, safety, morals, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of adult businesses within the City, thereby reducing or eliminating the adverse secondary effects from such adult businesses. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including adult materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to adult materials protected by the First Amendment or the Colorado Constitution, or to deny access by the distributors and exhibitors of adult entertainment to their intended market. Neither is it the intent nor effect of this chapter to condone or legitimize the distribution of obscene material.

3-14-2: DEFINITIONS:

ADULT ARCADE: An establishment where, for any form of consideration, one or more still or motion picture projectors, slide projectors, or similar machines, or other image producing machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

ADULT BOOKSTORE, ADULT NOVELTY STORE or ADULT VIDEO STORE: A commercial establishment which (a) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; (b) receives a significant or substantial portion of its revenues from; or (c) devotes a significant or substantial portion of its advertising expenditures to the promotion of: the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." An establishment may have other principal business purposes that do not involve the offering for sale rental or viewing of materials depicting or describing "specified sexual activities" or "specified anatomical areas", and still be categorized as an adult bookstore, adult novelty store, or adult video store. Such other business purposes will not serve to exempt such establishment from being categorized as an adult bookstore, adult novelty store or adult video store so long as the provisions hereof are otherwise met.

ADULT BUSINESS: An adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment, or nude model studio. The definition of adult businesses shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or similar professional person licensed by the state engages in medically approved and recognized sexual therapy.

ADULT CABARET: A club, restaurant, "pop shop", or similar commercial establishment which features: (a) persons who appear nude or in a state of nudity or semi-nude; (b) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities", or (c) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

ADULT MOTEL: A motel, hotel or similar commercial establishment which: (a) offers public accommodations for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas" and which advertises the availability of this adult type of material by means of a sign visible from the public right-of-way, or by means of any off-premises advertising including but not limited to, newspapers, magazines, pamphlets or leaflets, radio or television, or (b) offers a sleeping room for rent for a period of time less than ten (10) hours; or (c) allows a tenant or occupant to

sub-rent a sleeping room for a time period of less than ten (10) hours.

ADULT MOTION PICTURE THEATER: A commercial establishment where films, motion pictures, video cassettes, slides or similar photographic reproductions depicting or describing "specified sexual activities" or "specified anatomical areas" are regularly shown for any form of consideration.

ADULT THEATER: A theater, concert hall, auditorium, or similar commercial establishment which, for any form or consideration, regularly features persons who appear in a state of nudity or live performances which are characterized by exposure of "specified anatomical areas" or by "specified sexual activities."

EMPLOYEE: A person who works or performs in and/or for an adult business, regardless of whether or not said person is paid a salary, wage or other compensation by the operator of said business.

ESTABLISHMENT of an adult business means and includes any of the following:

(a) The opening or commencement of any such business as a new business;

(b) The conversion of an existing business into an adult businesses;

(c) The addition of an adult business to any other existing adult business; or

(d) The relocation of an adult business.

LICENSING OFFICER: The City Clerk.

MANAGER: An operator, other than a licensee, who is employed by an adult business to act as a manager or supervisor of employees or is otherwise responsible for the operation of the business.

NUDITY or STATE OF NUDITY: (a) the appearance of human bare buttock, anus, male genitals, female genitals, or the areola or nipple of the female breast; or (b) a state of dress which fails to opaquely and fully cover a human buttocks, anus, male or female genitals, pubic region or areola or nipple of the female breast.

NUDE MODEL STUDIO: Any place where a person, who appears in a state of nudity or displays "specified anatomical areas" is provided for money or any form of consideration to be observed, sketched, drawn, painted, sculpted, photographed, or similarly depicted by other persons.

OPERATOR: Includes the owner, permit holder, custodian, manager, operator or person in charge of any permitted or licensed premises.

PEEP BOOTH: A viewing room of less than one hundred fifty (150) square feet of floor space.

PERMITTEE and/or LICENSEE: A person in whose name a permit and/or license to operate an adult business has been issued, as well as the individual listed as an applicant on the application for a permit and/or license.

PERSON: An individual, proprietorship, partnership, corporation, limited liability company, association or other legal entity.

PREMISES or PERMITTED OR LICENSED PREMISES: Any premises that requires a license and/or permit and that is classified as an adult business.

PRINCIPAL OWNER: Any person owning, directly or beneficially, (a) ten per cent or more of a corporation's equity securities; (b) ten per cent of more of the membership interests in a limited liability company; or (c) in the case of any other legal entity, ten per cent or more of the ownership interests in the entity.

PRIVATE ROOM: A room in an adult motel that is not a peep booth, has a bed and a bath in the room or adjacent room, and is used primarily for lodging.

SEXUAL ENCOUNTER ESTABLISHMENT: A business or commercial establishment, that as one of its primary business purposes, offers, for any form of consideration, a place where two or more persons may congregate, associate, or consort for the purpose of "specified sexual activities" or the exposure of "specified anatomical areas" or activities when one or more of the persons is in a state of nudity or semi-nude. An adult motel will not be classified as a sexual encounter establishment by virtue of the fact that it offers private rooms for rent.

SEMI-NUDE: A state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

SPECIFIED ANATOMICAL AREAS: (a) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breast below a point immediately above the top of the areolae; or (b) human

male genitals in a discernibly turgid state, even if completely and opaquely covered.

SPECIFIED CRIMINAL ACTS: Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including, but not limited to, distribution of obscenity, prostitution, pandering, or tax violations;

SPECIFIED SEXUAL ACTIVITIES: (a) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts; (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (c) Masturbation, actual or stimulated; or (d) Human genitals in a state of sexual stimulation, arousal or tumescence; (e) Excretory functions as part of or in connection with any of the activities set forth in subdivisions (a) through (d) of this definition.

TRANSFER OF OWNERSHIP OR CONTROL OF AN ADULT BUSINESS means and includes any of the following:

(a) The sale, lease or sublease of the business;

(b) The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange or similar means;

(c) The establishment of a trust, management arrangement, gift or other similar legal devise which transfers ownership or control of the business, except for transfer by bequest or other operation of law upon the death of a person possessing the ownership or control.

3-14-3: LOCATION OF ADULT BUSINESSES; AMORTIZATION

(A) It shall be unlawful to operate or cause to be operated an adult business in any location in the City except as provided in this Code.

(B) It shall be unlawful to operate or cause to be operated an adult business within 500 feet of:

1. A church;

2. A school or child-care facility;

3. A public park (not including trails);

4. A massage parlor licensed under provisions of the City Code; or

5. A community correctional facility.

(C) It shall be unlawful to cause or permit the operation of an adult business within 1000 feet of another adult business or a massage parlor as defined by Section 12-48.5-103, C.R.S. The distance between any such businesses and those businesses specified in Subsection (B) hereof shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which the adult business is located.

(D) It shall be unlawful to cause or permit the operation or maintenance of more than one adult business in the same building, structure or portion thereof.

(E) Any adult businesses lawfully operating on the effective date of this Chapter that is in violation Subsections (B) through (D) will be permitted to continue for a period six months from the effective date hereof. However,

the zoning Administrator may grant an extension of time during which an adult business in violation of Subsections (B) through (D) will be permitted to continue upon a showing that the owner of the business has not had a reasonable time to recover the initial financial investment in the business. No such extension of time shall be for a period greater than that reasonably necessary for the owner of the business to recover his/her initial financial investment in the business. An adult business in violation of Subsections (B) through (D) may continue during such extended period, unless the business is sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such business shall not be enlarged, extended or altered except that the business may be brought into compliance with this Chapter. If two (2) or more adult businesses within 1,000 feet of one another and otherwise in a permissible location, the adult business which was first established and continually operating at the particular location will be deemed to be in compliance with Subsections (B) through (D), and the later established business(es) will be deemed to be in violation of Subsections (B) through (D).

(F) An adult business lawfully operating is not rendered a nonconforming use by the subsequent location of a church, school, child-care facility, public park, residential district, or a residential lot within 500 feet of the adult business; however, if the adult business ceases operation for a period of one hundred eighty days or more regardless of any intent to resume operation, it may not recommence operation in that location.

3-14-4: LICENSE REQUIRED – FEE

(A) No person shall conduct an adult business without first having obtained an annual Adult Business License.

(B) Applicants for an annual Adult Business License shall pay a license fee of five hundred dollars.

(C) In the event an application for an adult business is withdrawn or denied, the license fee shall not be refunded to the applicant.

3-14-5: LICENSE APPLICATION

(A) All applicants for an adult business license shall file an application for such license with the City Clerk on forms to be provided by the Clerk. Each principal owner and all managers and employees shall be named in the application form, and each of them shall be photographed and fingerprinted by the City's Police Department.

(B) The completed application shall contain the following information and shall be accompanied by the following documents:

1. If the applicant is:

   (i) an individual, the individual shall state his/her legal name and any aliases and submit satisfactory proof that he is twenty-one years of age;

   (ii) a partnership, the partnership shall state its complete name, and the names of all partners, whether the partnership is general or limited, and a copy of the partnership agreement, if any;

(iii) a corporation, the corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing under the statutes of the State of Colorado, or in the case of a foreign corporation, evidence that it is currently authorized to do business in the State of Colorado, the names and capacity of all officers, directors and principal stockholders, and the name of the registered corporate agent and the address of the registered office for service of process.

2. Whether the applicant or any other individual listed under Subsection (A) hereof had worked under or had had a previous adult business license under this Chapter or other adult business or adult entertainment ordinance from another state, city or county denied, suspended or revoked, including the name and location of the adult business for which the permit was denied, suspended or revoked, as well as the date of the denial, suspension or revocation.

3. Whether the applicant or any other individual listed under Subsection (A) hereof holds any other licenses under this Chapter or other similar adult business ordinance from another city, county or state and, if so, the names and locations of such other permitted business.

4. The location of the proposed adult business, including a legal description of the property, street address, and telephone number(s), if any.

5. Proof of the applicant's right to possession of the premises wherein the adult business is proposed to be conducted.

6. The applicant's, or any other individuals listed pursuant to Subsection (A), mailing address and residential address.

7. The driver's license number, social security number and/or his/her federally issued tax identification number for the individuals listed in Subsection (A).

8. A floor plan of the proposed licensed premises which specifies the location and dimensions of any manager's station and demonstrates that there is an unobstructed view from at least one of the managers' stations of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. The proposed floor plan shall designate those rooms or other areas of the premises where patrons are not permitted and shall also designate the use of each room or other area of the premises. The proposed floor plan need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. The diagram shall designate the place where the license will be conspicuously posted and the location of any proposed stage. A floor plan is not required of the licensed premises of an adult motion picture theater.

9. A current certificate drawing prepared, within thirty days prior to the application, by a land surveyor depicting the property lines and the structures containing any adult business or massage parlor within 1000 feet of the closest exterior wall of the structure in which the applicant's business is proposed to be located and depicting the property line of any church, school, child care facility, public park, residential zone district, or residential lot within 500 feet from the closest exterior wall of the structure in which the applicant's business is proposed to be located.

10. A written statement from the City's zoning official that the proposed location of such adult business

complies with the locational requirements of this Chapter.

11. Whether the applicant or any of the other individuals listed pursuant to Subsection A have been convicted of a specified criminal act within the times set forth in Section 3-14-8(A)(8) and, if so, the specified criminal act involved, the date of conviction and the place of conviction.

(C) If the applicant is an individual, he/she must sign the application for a license. If the applicant is other than [an] individual, each principal owner must sign the application for a license.

(D) The City Clerk shall not accept any application that is not complete in every detail. If an omission or error is discovered by the City Clerk, the application will be returned to the applicant for completion or correction without further action by the City Clerk. Any application rejected due to an omission or error shall be refiled only when the omission or error has been remedied. For the purposes of this Chapter, the date the City Clerk accepts an application which is complete in every detail shall be the date the application is filed with the City Clerk.

(E) In the event that the City Clerk determines that the applicant has improperly completed the application, he/she shall promptly notify the applicant of such fact and allow the applicant thirty (30) days to properly complete the application. The time period for granting or denying a license shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the application.

(F) Applicants for a license under this Chapter shall have a continuing duty to promptly supplement application information required by this section in the event that said information changes in any way from what is stated on the application. The failure to comply with said continuing duty within thirty days from the date of such change, by supplementing the application on file with the City Clerk, shall be grounds for the suspension or revocation of an adult business license.

3-14-6: APPLICATION FEE

Each applicant for a new license or as specified in §3-14-12(B), whether an individual, partnership, or corporation, shall pay an application fee of one hundred fifty dollars at the time or the filing of an application. Such application fee shall be nonrefundable.

3-14-7: INVESTIGATION

On receipt of a properly completed application, together with all information required in connection therewith, fingerprints and photographs, and the payment of the application and license fees, the City Clerk shall transmit the application to the City's Police Department for an investigation of the background of each individual applicant, employee, the partners of a partnership, or the officers, directors, and holders of the stock of a corporation. Each applicant shall pay a nonrefundable investigation fee at the time the application is filed in the amount then charged by the Colorado Department of Public Safety for each person who will be investigated. The investigation conducted by the Police Department shall be sufficient to verify the accuracy of all the information required by Section 3-14-5.

3-14-8: APPROVAL/DENIAL OF LICENSE

(A) The application of any applicant shall be approved or denied by the City Clerk within thirty days of the date the application is filed with the City Clerk. The City Clerk shall deny a license if:

1. The applicant is under the age of twenty-one years;

2. The applicant has made a false statement upon the application or gave false information in connection with an application.

3. The applicant or any holder of any class of stock, or a director, officer, partner, or principal of the applicant has had an adult business license revoked or suspended anywhere within the State of Colorado within one year prior to the application;

4. The applicant has operated an adult business which has determined to be a public nuisance under state law or this Code within one year prior to the application;

5. A corporate applicant is not in good standing or authorized to do business in the State of Colorado; or

6. The applicant is overdue in the payment to the City of taxes, fees, fines, or penalties assessed against him/her or imposed against him/her in relation to an adult business.

7. The applicant has not obtained required sales tax licenses.

8. The applicant has been convicted of a specified criminal act.

(B) In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the

reasons for the denial and a copy of such decision shall be sent by certified mail to the address shown in the application within ten days after his/her denial. An applicant shall have the right to a hearing before the City Manager as set forth in Section 3-14-11(C). A written request for such hearing shall be made to the City Manager within ten days of the date of the denial of the license by the City Clerk. This hearing shall be held within 30 days and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in Section 3-14-11(C) herein.

1. At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department or other enforcement officers, the applicant, or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the City Clerk. In such cases where specified criminal acts are in issue, the provisions of C.R.S. §24-5-101 shall control.

2. If the City Manager determines that the applicant is ineligible for a license per Subsection (A) hereof, he/she shall issue an order sustaining the City Clerk's denial of the application, within twenty days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to or be served on the applicant at the address on the application.

3. The order of the City Manager made pursuant to paragraph 2 above shall be a final decision and may be appealed to the District Court pursuant to Colorado Rule of Civil Procedure 106(a)(4). Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

(C) No license shall be issued by the City Clerk after approval of any application until the building in which the business is to be conducted is ready for occupancy with such furniture, fixtures, and equipment in place as are necessary to comply with the provisions of this Chapter, and then only after inspection of the premises has been made by the City's Police and Building Inspection Departments to determine that the applicant has complied with the plans and specifications submitted upon application. Such inspection of the premises shall be made within ten days after the City Clerk receives written notification from the applicant that premises are in compliance with the submitted plans and specifications. If the licensed location has been inactive, without good cause, for at least one year, or if the building has not been constructed and placed in operation within two years after approval or the license application, or construction of the building has not commenced within one year after such approval, the City Clerk, in his/her discretion, may revoke or elect not to issue or renew the license.

3-14-9: TERM OF THE LICENSE

All licenses granted pursuant to this Chapter shall be for a term of one year. Said term shall commence on January 1st of each year and terminate upon December 31 of the same year. Applications for a license filed at any other time during the year shall be treated the same as if they were filed January 1st of that year and shall terminate on December 31 of that same year, and no proration shall be permitted.

3-14-10: LICENSE RENEWAL

Renewal of an existing license granted pursuant to this Chapter may be had by payment of the annual licensing fee and filing of a renewal application with

the City Clerk not less than forty-five days prior to the date of expiration. The City Clerk may waive, for good cause shown, this filing time requirement.

3-14-11: SUSPENSION OR REVOCATION OF LICENSE.

(A) The City Manager may suspend a license for a period not to exceed six months or revoke any license granted pursuant to this Chapter upon a finding of any of the following facts:

1. That repeated disturbances of the public peace have occurred within the licensed establishment or upon any parking areas, sidewalks, access ways or grounds within the neighborhood of the licensed establishment involving patrons, employees or the licensee;

2. That the licensee or any employees thereof have offered for sale or knowingly allowed to be consumed or possessed upon the licensed premises, or upon any parking areas, sidewalks, walkways, access ways or grounds immediately adjacent to the licensed premises, narcotics, dangerous drugs or fermented malt, malt, vinous or spirituous beverages;

3. That the licensee or manager is not upon the licensed premises at all times that adult entertainment is being provided;

4. That adult entertainment was offered at the licensed establishment during hours prohibited by Section 3-14-14.

5. That the licensee, manager, or employee has allowed or has done nothing to prevent patrons from engaging in public displays of indecency in violation of state law or Sections 6-4-25 or 6-4-7 of this Code or has allowed patrons or employees to engage in acts of

prostitution or negotiations for acts of prostitution within the licensed establishment or upon any parking areas, sidewalks, access ways, or grounds immediately adjacent to the licensed establishment, when the licensee, manager, or employee knew or should have known such displays or acts were taking place;

6. That the licensee or manager made a false statement or gave false information in connection with an application for a license or a renewal of a license;

7. That the licensee, manager, or employee violated or permitted a violation of any provisions of this Chapter including the standards of conduct set forth in Section 3-14-15 herein;

8. That a manager or employee of the licensed establishment is under the age of twenty-one years;

9. That the licensee, in the case of a corporation, is not in good standing or authorized to do business in the State of Colorado;

10. That the licensee or an employee knowingly operated any aspect or facilities of the adult business during a period of time when the adult business license was suspended;

11. That the licensee is delinquent in the payment to the City or State for any taxes or fees past due;

12. That the licensee, manager, or employe has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, or masturbation to occur within the licensed premises; or

13. That the licensee, manager, or employee has been convicted of a specified criminal act.

(B) Nothing in this Chapter shall prohibit the City from taking any other enforcement action provided for by this Code, the laws of the state, or of the United States.

(C) A licensee shall be entitled to a hearing before the City Manager if the City seeks to suspend or revoke his/her license based on a violation of this Chapter.

1. When there is probable cause to believe that a licensee has violated or permitted a violation of this ordinance to occur in or near the licensed establishment, the Police Department may file a written complaint with City Manager setting forth the circumstances of the violation.

2. City Manager shall provide a copy of the complaint to the licensee, together with notice to appear before the City Manager for the purpose of a hearing on a specified date to show cause why the licensee's license should not be suspended or revoked.

3. In such cases where specified criminal acts are in issue, the provisions of C.R.S. §24-5-101 shall control.

4. At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department, or other enforcement, officers, the owner, occupant, lessee, or other party in interest, or any other witness shall offer which is relevant to the violation alleged in the complaint. The City Manager shall make findings of fact from the statements and evidence offered as to whether the violation occurred in or near the licensed establishment. If the City Manager determines that a violation did occur he/she shall issue an order suspending or revoking the license, within 20 days after the hearing is concluded, based on the findings of fact. A copy of the order shall be mailed to or served on the licensee at the address on the license.

5. The order of the City Manager made pursuant to subsection 3 above shall be a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4). Failure of a licensee to timely appeal said order constitutes a waiver by him/her of any right he/she may otherwise have to contest the suspension or revocation of his/her license.

6. The City Manager shall have the power to administer oaths, issue subpoenas, and when necessary, grant continuances. Subpoenas may be issued to require the presence of persons and production of papers, books and records necessary to the determination of any hearing which the City Manager conducts. It is unlawful for any person to fail to comply with any subpoena issued by the City Manager. A subpoena shall be served in the same manner as a subpoena issued by the District Court of the state. Upon failure of any witness to comply with such subpoena, the City Attorney shall:

(i) Petition any judge of the Municipal Court of the City, setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, that the court, after hearing evidence in support of or contrary to the petition, enter its order compelling the witness to attend and testify or produce books, records or other evidence, under penalty of punishment for contempt in case of willful failure to comply with such order of court; or

(ii) Petition the appropriate District Court setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, that the court, after hearing evidence in support of or contrary to the petition, enter its order as in other civil actions,

compelling the witness to attend and testify or produce books, records, or other evidence, under penalty of punishment for contempt in case of willful failure to comply with such order of court.

(D) In the event of suspension, revocation, or cessation of business, no portion of the license fee, application fee or investigative fee shall be refunded.

(E) When the City Manager revokes a license, the revocation shall continue for one year, and the licensee shall not be issued an adult business license for one year from the date the revocation became effective.

3-14-12: DISPLAY - TRANSFERABILITY - CHANGE OF OWNERSHIP

(A) Any adult business license issued pursuant to the terms of this Chapter shall be prominently displayed at all times upon the premises for which the license was issued in accordance with §3-14-5(B)(8).

(B) Licenses issued under this Chapter shall not be transferable except as provided herein. Any transfer or ownership or control by a licensee holding an adult business license shall result in termination of the license unless such licensee within thirty days prior to any such transfer files a written notice of such transfer accompanied by the application fee and an investigation fee as required by Sections 3-14-6 and 3-14-7. Any such transfer shall be reported on forms provided by the City Clerk and shall require the names of all new principal owners and any information as required by Section 3-14-5. Approval or denial by the City Clerk of such transfer shall be upon the same terms as provided for in this Chapter for the approval or denial of an adult business license.

(C) When a license has been issued to a husband and wife or to general or limited partners, the death of a spouse or partner shall not require the surviving spouse or partner to obtain a new license. All rights and privileges granted under the original license shall continue in full force and effect as to such survivors for the balance of the license.

(D) Each license issued under this Chapter is separate and distinct, and no person shall exercise any of the privileges granted under any license other than that which he holds. A separate license shall be issued for each specific adult business and each geographical location.

3-14-13: MANAGER – CHANGE OF MANAGER.

(A) A registered manager shall be on the premises of an adult business at all times that adult entertainment is being provided. It shall be unlawful for any person to work as a manager of an adult business without first registering with the City Clerk. The registration form shall require the applicant to provide his/her legal name and any aliases, home address, telephone number, and satisfactory proof that he is twenty-one years of age.

(B) In the event a licensee changes the manager or any employees of an adult business, the licensee shall report such change and register the new manager or any employees on forms provided by the City Clerk within ten days of such change. Any new employee or manager shall pay the investigation fee specified in Section 3-14-7 herein and shall be subject to approval or denial in accordance with the provisions of Section 3-14-8.

3-14-14: HOURS OF OPERATION. It shall be unlawful for a sexually oriented business to be open

for business or for the licensee or any employee of a licensee to allow patrons upon the licensed premises from 12:00 a.m. until 8: a.m.

3-14-15: STANDARDS OF CONDUCT.

(A) The following standards of conduct must be adhered to by employees of any adult business which offers, conducts, or maintains live adult entertainment:

1. No employee or entertainer mingling with the patrons or serving food or beverages shall be unclothed or in such attire, costume or clothing so as to expose to view any specified anatomical area.

2. No employee or entertainer shall encourage or knowingly permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

3. No employee or entertainer shall wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

4. a. No employee or entertainer shall be unclothed or in such attire, costume, or clothing so as to expose any portion of the specified anatomical area except upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron or behind a solid, uninterrupted physical barrier which completely separates the entertainer from any patrons. This barrier must be a minimum of ¼ inch thick and have no openings between the entertainer and any patrons. The stage shall be fixed and immovable.

b. No employee or entertainer shall perform while nude or semi-nude any obscene acts or obscene acts which simulate specified sexual activities.

5. No employee or entertainer shall use artificial devices or inanimate objects to depict any of the prohibited activities described in this section.

6. There shall be posted and conspicuously displayed in every area offering adult entertainment a list of food and beverage prices.

7. No adult entertainment use shall be located within any premises which is licensed for the retail sale of 3.2% beer, malt, vinous, or spirituous liquor, as such terms are defined in Title 12, Articles 46 and 47, C.R.S.

8. It shall be unlawful to permit the consumption of 3.2% beer or other alcoholic beverages within the same premises as an adult entertainment use.

9. Any tips for entertainers shall be placed by a patron into a tip box which is permanently affixed in the adult business and no tip may be handed directly to an entertainer. A licensee that desires to provide for such tips from its patrons shall establish one or more containers to receive tips. Any physical contact between a patron and an entertainer is strictly prohibited.

10. An adult business that provides tip boxes shall conspicuously display in the common area of the premises one or more signs in letters at least one (1) inch high to read as follows:

ADULT ENTERTAINMENT IS REGULATED BY THE CITY OF LITTLETON

Any tips are to be placed in tip box and not handed directly to the entertainer. Any physical contact between the patron and the entertainer is prohibited by law. Violators face maximum penalties of $1,000 and/or one year in jail.

11. No adult entertainment occurring on the premises shall be visible at any time from outside of the premises.

(B) Any licensee who offers, conducts, or maintains live adult entertainment or an adult arcade which exhibits in a peep booth, a film, videocassette, or other video reproduction, shall comply with the following requirements in addition to those set forth in Subsection (A) hereof.

1. It is the duty of the licensee of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

2. It is the duty of the licensee and manager of the premises to ensure that any doors to public areas on the premises remain unlocked during business hours.

3. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment or other forms of adult entertainment. If the premises have two or more manager's stations designated, then the interior of the premises shall be configured in such a manner

that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose excluding restrooms from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station. A manager's stations may not exceed thirty-two square feet of floor area.

4. No alteration to the configuration or location of an adult business may be made without the prior written approval of the Zoning Official.

5. It shall be the duty of the licensee, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in paragraph (3) hereof remains unobstructed by any doors, curtains, drapes, walls, merchandise, display racks or other materials at all times and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the license application filed pursuant to this Chapter.

6. No peep booth may be occupied by more than one person at any one time.

7. Peep booths must be separated from other peep booths by a solid, uninterrupted physical divider which is a minimum of ¼ inch thick and serves to prevent physical contact between patrons.

3-14-16: AGE RESTRICTIONS Admission to adult businesses is restricted to persons of the age of twenty one years or more during hours adult entertainment is being presented. This minimum age limitation also applies to any employees, agents, servants, performers or independent contractors working on the premises.

3-14-17: LIGHTING REQUIREMENTS

(A) All off-street parking areas and premise entries of adult businesses shall be illuminated from dusk to closing hours of operation with a lighting system which provides an average maintained horizontal illumination of one (1) foot candle of light on all parking surfaces and/or walkways. This required lighting level is to help ensure the personal safety of patrons and employees and to reduce the incidence of vandalism and other criminal conduct.

(B) The premises of all adult businesses, except adult motion picture theaters, shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to provide an illumination of not less than two foot candle of light as measured at the floor level.

(C) Adult motion picture theaters shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to provide an illumination of not less than one foot candle of light as measured at the floor level.

3-14-18: RIGHT OF ENTRY. The application for an adult business license shall constitute consent of the licensee and his/her agents or employees to permit the City's Police Department or any other agent of the City to conduct routine inspections of any licensed adult business during the hours the establishment is conducting business.

3-14-19: EXEMPTIONS GENERALLY. It is an affirmative defense to prosecution under this Chapter if a person appearing in a state of nudity or semi-nude did so in a modeling class operated:

(A) by a proprietary school, licensed by the State of Colorado; a college, junior college, or university supported entirely or partly by taxation;

(B) by a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or

(C) in a structure:

1. which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing;

2. where, in order to participate in a class a student must enroll at least three days in advance of the class; and

3. where no more than one nude model is on the premises at any one time.

Section 8: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 9: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 20th day of July, 1993, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of July 22, 1993.

PUBLIC HEARING on the Ordinance to take place on the 3rd day of August, 1993, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton, Colorado, at the hour of 7:30 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading, following public hearing, by a vote of 6 FOR and 0 AGAINST on the 3rd day of August, 1993, and ordered published by reference only in the Littleton Independent on the 5th day of August, 1993.

ATTEST:

/s/ Janice Owens
CITY CLERK

/s/ Susan M. Thornton
PRESIDENT OF CITY COUNCIL

APPROVED AS TO FORM:

/s/ Barry Segal
CITY ATTORNEY

CITY OF LITTLETON, COLORADO

ORDINANCE NO. 13

Series of 2001

INTRODUCED BY COUNCILMEMBERS: Mulvey and Ostermiller

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO, TO AMEND CHAPTER 14 OF TITLE 3 OF THE LITTLETON CITY CODE DEALING WITH ADULT ENTERTAINMENT ESTABLISHMENTS.

WHEREAS, certain Court cases have been decided regarding adult entertainment establishments since the City's adoption of its Adult Entertainment Ordinance and said Ordinance should be amended to avoid any legal challenges based on those cases; and

WHEREAS, an ambiguity has been determined to exist in the provisions dealing with appellate rights of applicants.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Section 3-14-2 definition of "Specified Criminal Acts" is amended to read as follows:

SPECIFIED CRIMINAL ACTS:

Sexual crimes against children sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, pandering or tax violation.

Section 2: Section 3-14-5(A) is amended to read as follows:

3-14-5: LICENSE APPLICATION:

(A) All applicants for an adult business license shall file an application for such license with the City Clerk on forms to be provided by the Clerk. Each principal owner and all managers and employees shall be named in the application form. Each manager, general partner, and in the case of a corporate applicant, the president of the corporation, shall be photographed and fingerprinted by the City's Police Department.

Section 3: Section 3-14-5(b) 1.(c) is amended to read:

(B) 1. (c) A corporation, the corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing under the statutes of the State, or in the case of a foreign corporation, evidence that it is currently authorized to do business in the State, the names and capacity of all officers, directors and principal owners, and the name of the registered corporate agent and the address of the registered office for service of process;

Section 4: Section 3-14-5(B) 1. is amended by addition of a new Subsection (d)

(d) A limited liability company shall state its complete name, the date of filing of the articles of organization and operating agreement, the names of all managers and members.

Section 5: Section 3-14-5(c) is amended to read:

(C) If the applicant is an individual, he/she must sign the application for a license. If the applicant is a corporation it must be signed by the President or Vice President and attested to by the Secretary or assistant Secretary. If the applicant is a general or

limited partnership it must be signed by a General Partner. If the applicant is a limited liability company it must be signed by the Manager.

Section 6: The first paragraph of Section 3-14-8 (B) is hereby amended as follows:

(B) In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by certified mail to the address shown in the application within ten (10) days after denial. An applicant shall have the right to a hearing before the City Manager as set forth in subsection 3-14-11 (C) of this Chapter. A written request for such hearing shall be made to the City Manager within twenty (20) days of the date of the denial of the license by the City Clerk. This hearing shall be held within thirty (30) days from the date a timely request for hearing is received by the City Manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection 3-14-11 (C) of this Chapter.

Section 7: Section 3-14-16 is amended to read as follows:

3-14-16: AGE RESTRICTIONS:

(A) Admission to adult businesses, other than those providing live performances which are characterized by the exposure of "specified anatomical areas," or by "specified sexual activities," is restricted to persons of the age of eighteen (18) years or more. This minimum age limitation also applies to any employees, agents servants, performers or independent contractors working on the premises. (Ord. 27, Series of 1993)

(B) Admission to adult businesses providing live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities" is restricted to persons of the age of twenty one (21) years or more during the hours when such live performances occur. This minimum age limitation also applies to any employees, agents, servants, or independent contractors working on the premises, provided however, the minimum age for performers shall be eighteen (18) years or more.

Section 8: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 9: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 5th day of June, 2001, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of June 7, 2001.

PUBLIC HEARING on the Ordinance to take place on the 19th day of June, 2001, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton,

Colorado, at the hour of 7:00 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading, following public hearing, by a vote of 5 FOR and 0 AGAINST on the 19th day of June, 2001, and ordered published by reference only in the Littleton Independent on the 21st day of June, 2001.

ATTEST:

/s/ Julie Bower
CITY CLERK

APPROVED AS TO FORM:

/s/ Larry W. Berkowitz
CITY ATTORNEY

/s/ Susan M. Thornton
PRESIDENT OF CITY COUNCIL

Case No. 01-1220

UNTIED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Plaintiff-Appellant,

v.

THE CITY OF LITTLETON,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

THE HONORABLE EDWARD NOTTINGHAM
UNITED STATES DISTRICT JUDGE
District Court Case No. 99-N-1696

DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

Opinion decided November 18, 2002 by the Honorable Circuit Judges Briscoe, Brorby, and Lucero

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* * *

I. STATEMENT PURSUANT TO FED.R.APP.P. 35(b)(1)

In accordance with Fed.R.App.P. 35(b)(1)(A) and (B), Defendant-Appellee (hereinafter "Littleton") respectfully requests that its Petition for Rehearing En Banc be granted for the following reasons:

(A) The recent decision of the Panel is discordant with the United States Supreme Court's decisions in ***Freedman v. Maryland***, 380 U.S. 51, 85 S.Ct. 734 (1965) and ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215, 110 S.Ct. 596 (1990).

(B) The recent decision of the Panel involves the following questions of exceptional importance:

(1) Whether prompt judicial review requires prompt access to judicial review or requires a prompt decision on the merits?

(2) Whether this Circuit, as a matter of first impression, should join the First, Fifth, Seventh and Eleventh Circuits, and the Colorado Supreme Court, and hold that prompt judicial review requires only prompt access to judicial review?

(3) If prompt judicial review requires a prompt decision on the merits, what methodologies can municipalities employ to satisfy the requirement in their adult business licensing ordinances?

(4) How can a municipality guarantee a prompt decision from an independent judiciary?

II. STATEMENT OF CASE

In 1993, the City of Littleton enacted an Ordinance adopting Chapter 14 of the Littleton Municipal Code ("the Ordinance") which set forth a variety of zoning and licensing requirements with regard to sexually-oriented businesses operating in Littleton. (Aplt's App. at 149-174; Aplt's App. at 30-52) The Ordinance was enacted under valid police powers of the legislative body of Littleton in accordance with the Untied States and Colorado Constitutions.

After suit was filed, the parties filed cross motions for summary judgment. Following oral argument, the district court issued its *Order and Memorandum of Decision* on March 31, 2001, which granted Littleton's motion for summary judgment in its entirety. On April 27, 2001, Plaintiff-Appellant (hereinafter "Christal's") filed a *Notice of Appeal* with this Court.

Following briefing and oral argument, the Honorable Judges, Briscoe, Brorby, and Lucero, issued an opinion which affirmed in part and reversed in part the district court's order. The panel affirmed the district court's finding that Christal's is an adult business and that the Ordinance's use of the terms "significant or substantial" in defining sexually-oriented businesses was constitutional. The panel also affirmed the district court's holding that Littleton's locational restrictions were constitutional.

With respect to the issue of prior restraint, and more specifically the issue of what constitutes prompt judicial review, the panel reversed the district court by holding

that prompt judicial review requires a prompt judicial decision. For the reasons set forth below, Littleton respectfully requests this Court review, *en banc*, the panel's decision of November 18, 2002, regarding the panel's interpretation of prompt judicial review.

III. ARGUMENT

A. The Panel's Decision is Discordant with Freedman v. Maryland and FW/PBS, Inc., v. City of Dallas.

The panel has incorrectly conflated the holdings in ***Freedman*** and ***FW/PBS***, literally resulting in allowing sexually-oriented businesses unfettered operation from legitimate, narrowly tailored, content-neutral governmental regulations. With its decision the panel may well have invalidated most adult business ordinances in this circuit.

Not only is the panel's decision inconsistent with the Supreme Court's rulings in ***Freedman*** and ***FW/PBS***, but it is also contrary to other Supreme Court rulings which recognize the importance of allowing time, place and manner regulations with respect to governing sexually-oriented businesses. ***Young v. American Mini Theatres, Inc.***, 427 U.S. 50, 71, 96 S.Ct. 2440, 2453 *(1976) citing*, ***Berman v. Parker***, 348 U.S. 26, 32-34, 75 S.Ct. 98 (1954); ***City of Renton v. Playtime Theaters, Inc.***, 475 U.S. 41, 47-48, 106 S.Ct. 925, 928-29 (1986)

The concept of prior restraint, as articulated by the court in ***Freedman***, was created to apply to content-based censorship schemes. The ***FW/PBS*** court, as well as its progeny, recognize the significant differences between censorship schemes and licensing schemes.

In a licensing scheme, the court in ***FW/PBS***, recognized a shift with regard to the burden of proceeding with litigation from the governmental entity to the business seeking the license, recognizing that businesses may avail themselves of emergency relief or expedited proceedings. Additionally, ***FW/PBS*** does not mandate that there be a prompt judicial decision; rather, citing directly to ***Freedman***, the plurality held that there must be expeditious judicial review available. ***FW/PBS***. 493 U.S. at 227.

In essence, the panel has expanded the application of inapposite precedent in ***Freedman*** and ***FW/PBS***. By requiring a prompt judicial decision, the panel has shifted the burden of obtaining not only judicial review, but also a decision, on the governing body. As such, the panel's decision is discordant with both ***Freedman*** and ***FW/PBS***.

B. Issues of Exceptional Importance.

1. Contrary to the panel's holding, prompt judicial review requires prompt access to judicial review.

It is axiomatic that Littleton's Ordinance is content-neutral. Applying the court's rationale in ***FW/PBS***, content-neutral regulations contain adequate procedural safeguards when the legislative scheme recognizes that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained, and expeditious judicial review of that decision must be available. ***FW/PBS***, 493 U.S. at 227.

As noted by the panel, the court was fractured in ***FW/PBS***. A plurality, Justices O'Connor, Stevens and Kennedy, found that two of the ***Freedman*** safeguards were necessary. First that any prior restraint in advance

of a final judicial determination on the merits must not be longer than necessary and the status quo needed to be preserved pending judicial resolution; and second, that there must be the possibility of prompt judicial access available in the event that the license is erroneously denied. Justices White, Scalia and Chief Justice Rehnquist did not apply any of the safeguards set forth in ***Freedman***. Justice[s] Brennan, Marshall and Blackman would have applied all three of the safeguards set forth in ***Freedman***.

The court in ***FW/PBS*** repeatedly refers to the necessity of judicial review being available. In writing for the court, Justice O'Connor refers numerous times to ***Freedman*** in holding that there must be the "possibility of" or "an avenue for" or "an avenue available for" prompt judicial review. She also cites to footnote n.4 in ***Shuttlesworth v. Birmingham***, 394 U.S. 147, 155, 89 S.Ct. 935 (1969), which held that "content-neutral time, place and manner regulations must provide for expeditious judicial review." The panel seems to find that because Justice O'Connor cited to ***Freedman***, she must have meant that a prompt judicial decision was necessitated. The panel's interpretation of Justice O'Connor's opinion in this way is inconsistent with the specific language utilized by Justice O'Connor, and, when applied, it is illogical and contrary to ***Freedman*** and ***FW/PBS***.

In a long paragraph in ***FW/PBS***, Justice O'Connor distinguishes censorship schemes from licensing schemes and at the conclusion of the paragraph, detailing the inherent differences between the two schemes, she states as follows: "[b]ecause of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court. . . . Limitation on the time

within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the principle that freedoms of expression must be ringed about with adequate bulwarks." ***FW/PBS, Inc. v. Dallas***, 493 U.S. at 230, *citing*, ***Bantam Books, Inc. v. Sullivan***, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963).

As found by the district court, Littleton's 30-day provision in the Ordinance specifies a brief period of time to either grant or deny a license. ***TK's Video, Inc. v. Denton County, Texas***, 24 F.3d 705, 708 (5th Cir. 1994) [upholding sixty (60) day period to make licensing decision]; ***Wolff v. City of Monticello***, 803 F.Supp. 1568, 1574 (D. Minn 1992) [upholding ninety-day period to make licensing decision]. In relevant part, Littleton's ordinance maintains the status quo as to an applicant seeking a new license because the business is non-operational until such time as it becomes licensed, and it is incongruous to require that a municipality allow operation pending review. ***City of Colorado Springs v. 2354, Inc.***, 896 P.2d 272, 284 (Colo. 1995).

For the reasons set forth below, Littleton cannot guarantee a prompt judicial decision. If a city must stay the enforcement of its license denial until a court of law has validated that denial, the business has no incentive to vigorously pursue any form of judicial review. This would ultimately result in shifting the burden back to the governing body to initiate and pursue the litigation. This is contrary to the court's holding in ***FW/PBS*** and is only necessitated within the confines of a censorship scheme as set forth in ***Freedman***.

Although the panel did not seem to ascribe much importance to distinguishing between a licensing scheme

and a censorship scheme, Justice O'Connor detailed the rationale for treating licensing schemes differently. She reasoned that within the context of a licensing scheme, a business should bear the burden of going to court. Justice O'Connor stated:

> The Court in ***Freedman*** also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in ***Freedman***, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining the business, there is every incentive for the applicant to pursue a license denial through court.

This pivotal distinction is the crux of the split among the circuits and is at the heart of the flawed reasoning applied by the panel in its ruling.

2. *This Circuit should follow the First, Fifth, Seventh and Eleventh circuits and the Colorado Supreme Court.*

The rationale adopted by the First, Fifth, Seventh and Eleventh Circuits, the Colorado Supreme Court, in ***2354*** and by Judge Matsch in ***Sanclub v. City of Federal Heights*** (98 M 71 decided June 9, 2000) and Judge Nottingham in this case, provides the most reasoned, consistent and practical application for reconciling the difficult

balance between protecting speech and the necessity of regulating sexually-oriented businesses.

Thorough analysis of this issue was undertaken by the Eleventh Circuit in ***Boss Capital, Inc. v. City of Casselberry***, 187 F.3d 1251, 1254 (11th Cir. 1999). That court analyzed the critical distinctions between ***FW/PBS*** and ***Freedman*** and its reasoning and logic are compelling. In ***Boss Capital*** the court noted that prompt judicial resolution was necessitated in ***Freedman*** because ***Freedman*** addressed a censorship scheme which allowed officials to completely ban movies which the officials deemed "obscene." The Court noted that unquestionably, censors pass judgment on the content of speech. Conversely, in a licensing scheme, the court noted that officials look at the ministerial factors associated with licensing procedures which are mundane. The ***Boss Capital*** court cited to the ***FW/PBS*** Court's finding that "licensing officials do not pass judgment on the content of any protected speech; rather, they look at the general qualification of each license applicant, a ministerial function that is not presumptively invalid." ***Boss Capital, Inc.***, 187 F.3d at 1256, quoting ***FW/PBS***, 493 U.S. at 229. Ultimately, the ***Boss Capital*** Court found the foregoing differences appropriately necessitated "treating unlike things differently according to their differences." ***Boss Capital, Inc.***, 187 F.3d at 1256 *quoting*, ***Lyes v. City of Riviera Beach***, 166 F.3d 1332, 1342 (11th Cir. 1999).

The Colorado Supreme Court similarly concluded in its analysis and application of ***FW/PBS*** that Colo. R.Civ.P. 106(a)(4) (Certiorari Review) provisions provide adequate procedural safeguards and an avenue for prompt judicial review so as it minimize suppression of speech. ***2354***, 896

P.2d at 284. The Court in ***2354***, concluded that the procedural safeguards in an ordinance's use of Rule 106 ensured that any impermissible prior restraint on a particular applicant's protected rights of free speech could be remedied promptly by judicial intervention. ***Id***.

The Constitutional sufficiency of requiring judicial access as opposed to a judicial decision is highlighted in Judge Niemeyer's (concurring in part and dissenting in part) opinion in ***11126 Baltimore Boulevard, Inc. v. Prince George's County***, 58 F.3d 988 (4th Cir. 1995).

> On the same day that the county denies an application for a special exception, the applicant may obtain access to the (State Courts). I conclude that this is all that is required by ***FW/PBS, Inc.***, safeguard that expeditious review be available . . . I would interpret that safeguard as requiring only that exit from the executive branch (the administrative permit system) be prompt and that access to the judicial system be immediately available. Since the nature of the safeguard is access to a court, and not the rendering of any given decision of the court, I cannot subscribe to the position that the procedural safeguard requires prompt completion of judicial review any more than it requires a particular result.

11126 Baltimore Boulevard, Inc., 58 F.3d at 1002.

Moreover, as stated in ***Thomas v. Chicago Park District***, 227 F.3d 921 (7th Cir. 2000), 534 U.S. 316, 122 S.Ct. 775 (2002), a licensee also has a right to sue in

Federal District Court and seek a preliminary injunction.[1] The panel failed to discuss federal remedies which are available.

3. The panel failed to set forth any methodologies for municipalities to employ with respect to licensing sexually-oriented businesses.

It has long been held that municipalities have the right to regulate adult businesses. ***Z.J. Gifts D-2 v. City of Aurora***, 136 F.3d 683, 686 (10th Cir. 1998); ***Essence, Inc. v. City of Federal Heights***, 285 F.3d 1272, 1284 (10th Cir. 2002). Part of that regulation generally consists of licensing adult businesses. ***Essence, Inc.***, 285 F.3d at 1289-1290; ***FW/PBS***, 493 U.S. at 225-226.

From a review of case law that concerns adult businesses it can be seen that in the State of Colorado adult licensing ordinances frequently rely on C.R.C.P. 106(a)(4) as a methodology to provide prompt judicial review. While the panel ruled that Rule 106 is insufficient to meet the requirement of a prompt final judicial decision, the panel provided no methodologies which municipalities can employ to satisfy the requirement, nor did the panel explain how municipal governments, exercising legislative powers, can control the sequencing and timing of judicial action. In the absence of a methodology which would satisfy the constitutional standard set by this Circuit, the

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[1] In this case, Christal's sought a preliminary injunction, at approximately the same time it opened for business.

practical result is that adult businesses cannot be required to meet licensing standards.

As will be discussed below, municipalities cannot assure that an independent judiciary will provide an expedited review. The panel apparently felt that the expedited review provisions of C.R.C.P. 106(a)(4)(VIII) and the assumption that a judge hearing a 106 review would recognize an obligation under ***Freedman*** to render a prompt decision were insufficient. The panel also apparently felt that access to judicial review in the context of preliminary injunctive relief was insufficient.

The Circuits which the panel has determined this Circuit should follow provide little guidance. The Sixth Circuit in ***Nightclubs, Inc. v. City of Paducah***, 202 F.3d 884 (6th Cir. 2000), recognized that a municipality has no authority to control the period of time in which a state court will adjudicate a matter. The Sixth Circuit further recognized that a municipality did not even possess the authority to create an avenue for prompt judicial review. The Sixth Circuit did discuss potential solutions. It offered as a suggestion that the cities petition their state legislatures to pass laws that would obligate state courts to resolve such appeals within a short period of time. The municipality could also provide a provisional license. However, that would alter the status quo. In Littleton's case, where its licensing requirements were noted not to involve discretion on the part of the licensing official (Opinion, p. 32, fn. 13), this would require Littleton to provide licenses to a variety of inappropriate applicants who may well be engaged in generating the very secondary

effects the ordinance seeks to avoid.[2] Moreover, such a requirement could also create estoppel type arguments by applicants who may invest significant sums based on provisional licenses.

Given the fact that the panel's decision affects many licensing ordinances, if this Circuit chooses to adopt a prompt judicial review requirement which eliminates C.R.C.P. 106 as an appropriate avenue of judicial review, it is important that methodologies by which cities can comply with the Circuit's standard are articulated.[3]

4. *The Panel's holding fails to take into account the impossibility of a municipality guaranteeing a prompt judicial decision from an independent judiciary*

The panel's holding fails to take into account the Separation of Powers Doctrine within the context of requiring a municipal government guarantee a prompt judicial determination. Article III of the Constitution for the State of Colorado divides the powers of government into three distinct, co-equal branches, and directs that "no

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[2] This could include applicants who have made false statements in the application, applicants who operated an adult business which was determined to be a public nuisance, applicants who have been convicted of sexual crimes against children, sexual abuse, rape or crimes connected with obscenity, prostitution or pandering.

[3] Given the split of authority in the Circuits, and even between this decision and previous district court decisions, and given the availability of 42 U.S.C. §1988 attorney's fees, it is unfair to require cities to either forego adult licensing schemes or experiment at their peril with solutions until the standard is clarified.

person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." Colo. Const. Art. III.

The Colorado Supreme Court explained in ***In the interest of J.E.S.***, 817 P.2d 508 (Colo. 1991), that the separation of powers doctrine means that [ ] each branch is independent and that they may not interfere with the authority and duties of the other. The Supreme Court said:

> It is an ingrained principle in our government that the three departments of government are coordinate and shall co-operate and complement, and at the same time act as checks and balances against one another *but shall not interfere with or encroach on the authority or within the province of the other* . . . and *[i]n their responsibilities and duties, the courts must have complete independence. . . . It is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source. (emphasis supplied)*

In the Interest of J.E.S., 817 P.2d at 511 [*Emphasis supplied*].

This panel's decision imposes on municipal governments seeking to regulate sexually oriented business through licensing schemes a fundamentally impossible duty to guarantee judicial action. In requiring additional guarantees and assurances based on ***Freedman*** and ***Baby Tam & Co v. City of Las Vegas***, 154 F.3d 1097 (9th Cir. 1998), the unworkable nature of the prompt determination requirement was not lost on other Courts.

> In demanding this greater assurance, ***Freedman*** and ***Baby Tam & Co.*** may impose an impossible burden on the City. The City lacks the authority to prescribe a specified time when a state or federal judicial officer must render a decision. It has been suggested that the California legislature produce – at least with respect to state judicial officers – but even the state's authority is doubtful.

Mai Lee Le v. City of Citrus Heights, 1999 U.S. Dist. Lexis 13477 at 23 (E.D. Cal. 1999)

In ***Mai Lee Le***, the Legislative Counsel of California opined that a state law requiring a decision within 90 days of a Petition for Writ of Mandamus seeking judicial review of a license denial would likely violate the separation of powers doctrine. But the impossibility of the requirement did not dispose of its potency:

> In sum, ***Freedman*** and ***Baby Tam and Co.*** insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – *however impractical they may be* – are the law. (*emphasis supplied*) ***Id.*** at 24.

The First Amendment does not require such impossible results that plainly infringe on the independence of the judiciary and threaten the very purposes behind the separation of powers doctrine.

In further support of its holding that there is the necessity of a prompt judicial decision, the panel articulated concerns regarding possible bias, bad faith and subterfuge regarding the application process. Littleton's Ordinance does not permit officials unfettered discretion

to deny licenses. This Court should not presume bias, bad faith, or *ultra vires* action on the part of city officials; indeed, the required presumption is that regarding public officials, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." ***United States v. Chemical Foundation, Inc.***, 272 U.S. 1, 14-15, 47 S.Ct. 1 (1926); ***United States v. Armstrong***, 517 U.S. 456, 116 S.Ct. 1480 (1996).

IV. CONCLUSION

For these reasons, Petition requests a rehearing en banc.

V. APPENDIX

The Panel's decision of November 18, 2002 is appended hereto.

Respectfully submitted,

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* * *

Case No. 01-1220

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Plaintiff-Appellant,

v.

THE CITY OF LITTLETON,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

THE HONORABLE EDWARD NOTTINGHAM
UNITED STATES DISTRICT JUDGE
District Court Case No. 99-N-1696

BRIEF OF AMICUS CURIAE THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC, WITH CONSENT OF THE PARTIES

Opinion decided November 18, 2002 by the Honorable Circuit Judges Briscoe, Brorby, and Lucero

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December 13, 2002

COUNSEL FOR AMICUS CURIAE COLORADO MUNICIPAL LEAGUE

COLORADO MUNICIPAL LEAGUE'S CORPORATE DISCLOSURE STATEMENT

The Colorado Municipal League ("CML") is a non-profit, voluntary association of 265 municipalities located throughout the state of Colorado. All of CML's member municipalities are governmental entities, which exempts them from Fed. R. App. P. Rule 26.1. However, CML is registered with the Colorado Secretary of State as a non-profit Colorado corporation in good standing. CML has no parent corporations, and is not owned by any publicly held company.

* * *

INTERESTS OF AMICUS CURIAE

The Colorado Municipal League is a non-profit, voluntary association of 265 municipalities located throughout the state of Colorado (comprising 98.68 percent of the total incorporated state population), including all 82 home rule municipalities, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. CML has been appearing as an amicus before the Colorado Court of Appeals, the Colorado Supreme Court and this court for decades in appeals where a significant decision affecting Colorado municipalities is possible.

Many of CML's municipal members have created business licensing schemes for the regulation of adult businesses. These municipalities seek to preserve the health, safety and welfare of their community by regulating such

businesses. CML as an amicus would provide the Court with a statewide municipal perspective on the issues presented in this case, and would assure that the general interest of those other member municipalities is represented. CML members have a great deal at stake in the proper resolution of this matter.

All parties to this case have consented to CML's participation as an *amicus* in this case. FED. R.APP.P. Rule 29(e) provides that an *amicus curiae* must file its brief no later than 7 days after the principal brief of the party being supported. The City of Littleton filed its brief on December 6, 2002. This brief is filed on December 13, 2002. Therefore, it is timely filed and no delay will result from the participation of CML as *amicus curiae*.

ARGUMENT

A rehearing *en banc* is essential because the decision in this case jeopardizes the existing regulatory schemes of many Colorado municipalities.

Many Colorado municipalities regulate adult businesses to protect the health, safety and welfare of their communities, primarily to prevent or limit the demonstrated negative secondary effects such as neighborhood blight, decline of property values, increased crime in general (such as disturbing the peace, public indecency, public drunkenness, and drug-related violations), increased sexually-related crimes (such as rape, prostitution, and sexual assault), noise, litter, traffic congestion, and the spread of sexually transmitted diseases. Many of those municipalities have adopted a licensing scheme for the regulation of adult businesses that is substantially similar to Littleton's, including specifically the reliance on

C.R.C.P. 106(a)(4) to provide "prompt judicial review" once a municipality has rendered a final decision. While an exact count is not possible, a preliminary review of approximately fifty municipal codes reveals at least thirty-two municipalities (or approximately 60%) that rely on a process substantially similar [to] Littleton's. These cities range in size and scope from small rural communities of fewer than 250 persons to large urban communities of more than 275,000.

These ordinances generally require the owner or operator of a business to apply for a license, and to provide certain information on the license application. The ordinance specifies the grounds for denial, revocation or suspension, and provides a process of administrative review of such decisions, within specified timeframes. Although the final decision-maker and deadlines vary, most provide for a hearing and a final decision by the City Manager within thirty days. Upon a final decision of the municipality, the applicant may appeal to the state district court under the procedures set forth in C.R.C.P. 106(a)(4). These ordinances are duly adopted legislative policies of the municipality, enacted under the valid exercise of police power in accordance with the Colorado and United States Constitutions.

As the panel noted, the Circuits are split on the question of whether "prompt judicial review" means that an applicant must have prompt ***access*** to a court, or must receive a prompt ***decision*** from a court.[1] Resolving this

[1] The panel in its decision noted that the 11th, 5th, 7th, and 1st Circuits have found access sufficient; while the 6th, 9th, and 4th have found that a decision is required, and that the circuits were thus split 4

(Continued on following page)

split becomes all the more important when viewed in light of the U.S. Supreme Court's recent decisions, declining to resolve it in **City News and Novelty, Inc., v. City of Waukesha**, 531 U.S. 278 (2001) *cert. Dismissed* and **Thomas v. Chicago Park District**, 227 F.3d 921 (7th Cir. 2000), 534 U.S. 316, 122 S.Ct. 775 (2002).

A rehearing is essential in this case because until a clarification of prompt judicial review is obtained it is impossible for a municipality to design with confidence a constitutional ordinance to validly regulate adult businesses. CML agrees with Defendant-Appellee that, given the split of authority in the Circuits, and even between this decision and previous district court decisions, and given the availability of 42 U.S.C. §1988 attorney's fees, it is unfair to require cities to either forego adult licensing schemes or experiment at their peril with solutions until the standard is clarified.

If the decision of the panel stands, it will be impossible for a municipality to design an adult licensing scheme

to 3. *See Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999); *TK's Video v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); *Jews for Jesus v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). See also *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 1000-01 (4th Cir. 1995). However, as the 5th Circuit noted in *Encore Videos Inc. v. City of San Antonio*, No. 00-51119, slip op. at 12 (W.D. Tex. Oct. 29, 2002) it appears that the 2d Circuit also has found access sufficient. *Beal v. Stern*, 184 F.3d 117, 129 (2d Cir. 1999). Thus the circuits are now actually split 5 to 4, with the 10th Circuit making up the fourth circuit to find that a decision is required.

that provides sufficient prompt judicial review to meet the standard articulated by the court, namely a stated time frame within which a state district court judge must reach a decision.

Other courts have recognized the impossibility of a municipality directing, ordering, or otherwise influencing a district court to render an opinion in a particular case within a time certain. ***Mai Lee Le v. City of Citrus Heights***, 1999 U.S. Dist. Lexis 13477 at 23 (E.D. Cal. 1999). In Colorado, it is highly questionable whether even a legislative amendment by the Colorado General Assembly could achieve this result, given the separation of powers. Nonetheless, the existing opinion suggests that this is the only possible way to render Littleton's ordinance – and by extension, those of numerous other municipalities – constitutional.

Finally, rehearing is necessary because this opinion jeopardizes not only adult business regulatory schemes, but also other municipal licensing schemes with First Amendment or free speech implications that rely on C.R.C.P. 106(a)(4) to provide prompt judicial review. While the particular issue in this case happens to relate to the licensing of adult businesses, the same analysis could apply to invalidate other municipal licensing schemes in which free speech is implicated. For example, many Colorado municipalities have ordinances requiring licenses for placing newspaper boxes in public places. Denial of such a license may be appealed, as with adult business ordinances, to the district court through the procedures outlined in C.R.C.P. 106(a)(4). If a Littleton-style ordinance is constitutionally infirm for failure to provide prompt judicial review in the context of an adult business, it is likely so in the context of a newspaper box.

Newspaper box cases have also been held to have First Amendment implications. See for example, *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750 (1988).

CONCLUSION

For the foregoing reasons, *amicus curiae* Colorado Municipal League requests that the court grant Defendant-Appellant City of Littleton's Petition for Rehearing En Banc.

Respectfully submitted,

COLORADO MUNICIPAL LEAGUE.

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* * *

(3)

No. 02-1609

Supreme Court, U.S.
FILED
JUN 25 2003
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In The

Supreme Court of the United States

THE CITY OF LITTLETON, COLORADO,

Petitioner,

v.

Z.J. GIFTS D-4, L.L.C.,
a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED

The questions presented by Petitioner are as follows:

1. For the purposes of reviewing content-neutral sexually oriented business licensing decisions, is prompt judicial access sufficient or must a city somehow provide a prompt judicial decision?

2. If prompt access to a court of law is insufficient, then what must a city do to provide sufficient safeguards under the First Amendment?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Z.J. Gifts D-4, L.L.C., states it is a Colorado Limited Liability Company. None of its shares are held by a publicly traded company and there are no parent companies.

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STATEMENT OF THE CASE

The City has filed a Petition for Writ of Certiorari on the issue of whether the procedures for appealing an adverse licensing decision in the Littleton adult entertainment business licensing ordinance satisfy the constitutional requirement of "prompt judicial review" established in *Freedman v. Maryland*, 380 U.S. 51 (1965), and applied to sexually oriented businesses in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Respondent brought the instant action pursuant to 42 U.S.C. section 1983 challenging on numerous grounds the constitutionality of the Littleton adult entertainment business licensing ordinance, Littleton Municipal Code section 3-14-1, *et seq*. The district court upheld the Littleton ordinance in all respects. (App. 40-67). The Tenth Circuit opinion affirmed in part and reversed in part the district court's order. (App. 1-39).

The Tenth Circuit determined that Littleton waived the issue of abstention under *Younger v. Harris*, 401 U.S. 37 (1971), even though the City had filed a civil complaint in state court against Respondent for violations of the challenged ordinance. (App. 9-10). The Tenth Circuit found that Respondent did not have standing to challenge the civil disability provisions or the suspension and revocation provisions of the Littleton ordinance. (App. 11). See *Essence Inc. v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002). The panel went on to determine that Respondent did not have standing to challenge the terms "substantial or significant" on vagueness grounds. (App. 12-14). The Tenth Circuit determined that these terms were readily susceptible to a narrowing construction and suggested that a common method has been to develop a

percentage that will act as a guide as to what constitutes substantial and significant. Respondent's challenge to a 21 year old age restriction was found to be moot. (App. 14-15).

The Tenth Circuit then discussed in detail the decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 107 L.Ed. 2d 603, 110 S.Ct. 596 (1990), and found the requirements of obtaining fingerprinting and a zoning certificate prior to obtaining an adult entertainment license were "unconstitutional for failure to specify a time limit within which the City must act." (App. 20-24). The Court upheld a requirement that a sales tax license be obtained from the City prior to obtaining an adult entertainment establishment license. (App. 21). Respondent filed a petition for panel rehearing on this issue, which petition was denied. (App. 68-69).

The Tenth Circuit then addressed the issue of prompt judicial review, and after reviewing the case law from the Supreme Court and other circuits on this issue, determined that the "prompt judicial review" required a prompt judicial determination. Because the procedure provided in the Littleton ordinance, Colorado Rules of Civil Procedure 106(a)(4), "does not assure that license decisions will be given expedited review," the Littleton ordinance was determined to be unconstitutional. (App. 28-32). Finally, the panel upheld Littleton's location restrictions on adult entertainment establishments. (App. 33-38).

REASONS THE PETITION SHOULD BE DENIED

I. THE STATEMENT OF THE ISSUES PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI REVEALS A PROFOUND MISUNDERSTANDING OF THIS COURT'S DECISIONS

The statement of the issues presented by Littleton in the Petition reveals a profound misunderstanding of this Court's previous decisions concerning the licensing of activities protected by the First and Fourteenth Amendments.

The first issue is stated as follows:

> For the purposes of reviewing content-neutral sexually oriented business licensing decisions, is prompt judicial access sufficient or must a city somehow provide a prompt judicial decision?

Thus, the basic premise of the principal issue presented by the City is an oxymoron because, by its own terms, the Littleton ordinance, imposing an additional licensing requirement on businesses providing sexually explicit publications and films, necessarily regulates a business on the basis of the content of the speech it presents. This Court in the unanimous opinion in *Thomas v. Chicago Park District*, 534 U.S. 316, n.2 (2002), recently distinguished the ordinance struck down in *FW/PBS* from a content neutral permit scheme since "it involved a licensing scheme that targets businesses purveying sexually explicit speech." *Id.* See also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (Kennedy, J., concurring in the judgment) [the term "content neutral" is "imprecise"].

Despite these recent statements of the Court, the City repeatedly insists throughout the Petition that its licensing ordinance should be evaluated as a content neutral time, place and manner restriction addressing the adverse secondary effects of one type of speech. This is the central premise of its argument. In the Petition, p. 16, the City states "the Tenth Circuit, by requiring a prompt judicial decision, has conflated the standards traditionally used to analyze a content-based censorship scheme onto a content-neutral licensing scheme, and it has also shifted the burden of obtaining judicial review to the government, thereby reinstituting *Freedman* [*v. Maryland*]'s third prong and applying it within the context of a content-neutral licensing scheme." The City goes on to assert that "the Tenth Circuit decision assumes that Littleton officials charged with licensing decisions should not be trusted." Petition, p. 19.

These arguments are directly contrary to consistent decisions of this Court regarding prior restraints. The United States Supreme Court has always applied the strictest level of scrutiny to any law requiring a license to engage in speech activity. In *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), the Court recognized that "[t]he struggle for the freedom of the press was primarily directed against the power from the licensor."

> While "[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, at 225 (O'Connor J. plurality) *quoting Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (also quoted in *Vance v. Universal Amusements*, 445 U.S. 308,

> 317 (1980); *See also, Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1962); and *New York Times v. United States*, 403 U.S. 713, 714 (1971).
>
> The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Underlying the distinction is a principle strongly rooted in our law:
>
> [A] *free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.* It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. *See Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958).

Southeastern Promotions, Ltd., 420 U.S. at 558-559 (emphasis in original). *See also, Alexander v. United States*, 509 U.S. 544, 125 L.Ed. 2d 441, at 460-461, 113 S.Ct. 2766 (1993) (Kennedy, J. dissenting).

The City's arguments completely ignore these principles, as well this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In *FW/PBS*, the Court struck down a licensing ordinance that regulated adult businesses:

> Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer*

Publishing Co., 486 U.S. 750, 757, 100 L.Ed.2d 771, 108 S.Ct. 2138 (1988) [citations omitted].

* * *

Second, a prior restraint that fails to place limits on the time within which a decisonmaker must issue the license is impermissible. *Freedman* [*v. Maryland*, 380 U.S. 51], at 59, 13 L.Ed.2d 649, 85 S.Ct. 734 [(1965)]. . . . The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating excessive administrative discretion," *Freedman*, supra, at 56-57. Where a licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech. *FW/PBS v. City of Dallas*, 493 U.S., at 225-227.

The Littleton ordinance contains both of the evils identified in *FW/PBS*. While the criteria for granting a license have been held to provide objective standards, the requirement for a license itself involves the exercise of broad discretion by Littleton City officials. Section 3-14-2 of the Littleton Municipal Code defines "adult business" to include, *inter alia*, an adult bookstore, adult novelty store, or adult video store, which devotes a "substantial or significant" portion of its stock in trade, floor space, or advertising costs to sexually explicit items or receives a significant or substantial portion of its revenues from such

items. (App. 83).[1] The terms "significant or substantial," are not defined in the ordinance.[2] Thus, the City retains broad discretion to determine whether or not a business even needs to obtain a license to present protected expression. In this case, the City has consistently refused to provide any guidance as to the meaning of these terms. Respondent has always contended it does not seek to be an "adult bookstore, adult novelty store or adult video store" and, in fact, is not such a business subject to the licensing requirement. The Littleton ordinance vests impermissibly broad discretion in licensing officials to determine who and

---

[1] Littleton Municipal Code, Section 3-14-2 defines an "adult bookstore, adult novelty store, or adult video store" as:

> A commercial establishment which 1) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; 2) receives a significant or substantial portion of its revenues from; or 3) devotes a significant or substantial portion of its advertising expenditures to the promotion of: the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

The terms, "significant or substantial," and "characterized" are not defined in the ordinance.

[2] The Littleton ordinance definition is broader than the definition in the ordinance struck down in *FW/PBS* which defined "Adult Bookstore or Adult Video Store" to be "a commercial establishment which as one of its principal business purposes offers for sale or rental" sexually explicit materials. *FW/PBS*, 493 U.S. 253-254, n.5 (Scalia, J. dissenting). As noted by Justice Scalia, "the phrase 'as one of its principal business purposes' can connote that the material containing the specified depictions and descriptions does not merely account for a substantial proportion of sales volume but is also intentionally marketed *as material of that character*." *Id.*, at 260 (emphasis in original).

who may not need to obtain a license to present one category of protected speech.

"'The settled rule is that a system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions, Ltd.*, 420 U.S. at 558, *quoting, Freedman v. Maryland*, 380 U.S. 51, 57 (1965). With regard to the requirement of prompt judicial review, *Freedman* observed that a licensing scheme which lacks the articulated procedural safeguards establishes "a statutory context in which judicial review may be too little and too late" and that "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Freedman*, 380 U.S. at 57-58.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, the Court invalidated an ordinance regulating, *inter alia*, the same activities as those regulated in the challenged Littleton ordinance. The Court expressly held that two of the *Freedman* procedural safeguards were mandated where a licensing requirement was placed on sexually oriented businesses:

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained and there must be the possibility of prompt judicial review in the event that the license is

erroneously denied. *See Freedman supra*, at 51, 13 L.Ed.2d 649, 85 S. Ct. 734. *See also Shuttlesworth* [*v. City of Birmingham*], 394 U.S. [147], at 155, n.4, 22 L.Ed.2d 162, 89 S.Ct. 935 [(1969)] (content-neutral time, place, and manner regulation must provide for "expeditious judicial review"); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 53 L.Ed.2d 96, 97 S. Ct. 2205 (1977).

* * *

As discussed *supra*, the Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial.

Id., at 228-229. (O'CONNOR, J. plurality).

The Court specifically stated in *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977), that, in the absence of immediate judicial review "the state must instead allow a stay." *See, 11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 1001 (4th Cir. 1995) (*en banc*) ["the County could avoid the constitutional problem engendered by its present scheme by permitting adult bookstores to operate until judicial determination is rendered . . . "]. *See also, Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894. (6th Cir. 2000).[3]

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[3] The City mischaracterizes the recent decision in *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791 (6th Cir. 2003), rejecting a provisional license requirement as being

(Continued on following page)

Under the Littleton ordinance, as determined by the Tenth Circuit, there is no assurance of prompt judicial determination. There exists no guarantee that any adult business will operate while any judicial licensing proceedings are pending even before the trial court, nor is there any guarantee that any judicial review that might be available (either in the trial court or on direct appeal) will be required in the shortest fixed period compatible with sound judicial resolution." *Freedman*, 380 U.S. at 39.

The City of Littleton's licensing scheme lacks the crucial procedural safeguards required by *Freedman* to ensure that judicial review does not come "too little and too late." This Court stressed the need for "prompt" and "expeditious" judicial review by repeating these terms no less than five times in Section II.B. of Justice O'Connor's plurality opinion in *FW/PBS, Inc. v. City of Dallas* when referring to the requirement of judicial review. As noted in *Baltimore Boulevard*, 58 F.3d at 1000, "Justice O'Connor's decision in *FW/PBS* cannot be properly read to relax the *Freedman* prompt judicial review requirement. . . . " Under the procedures contained in the challenged ordinance, such review could take years. In the absence of prompt judicial review, the failure of the Littleton ordinance to provide *a mandatory stay* pending review results in a system of prior restraint that fails to properly protect freedom of expression. Therefore, as in *FW/PBS*, the

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insufficient to save a licensing requirement from a challenge for failure to provide prompt judicial review. The Sixth Circuit specifically determined that the Ohio judicial review statutes rendered the provisional license provisions "a nullity" by exempting many proceedings from judicial review. *Id.*, at 801.

ordinance is unconstitutional. The Tenth Circuit correctly struck down the ordinance in this case, and the Petition for Writ of Certiorari should be denied.

II. A PLURALITY OF CIRCUITS HAVE HELD THAT PROMPT JUDICIAL REVIEW REQUIRES A PROMPT JUDICIAL DETERMINATION UNDER *FW/PBS* AND *FREEDMAN*

Petitioner argues that this Court should grant certiorari in this case because the Circuits are "hopelessly deadlocked," Petition, p. 8, on the issue of whether "prompt judicial review" means prompt access to judicial review or a prompt judicial determination. While there is a split in the circuits, this split is not as severe as asserted by the City.

The Fourth, Sixth and Ninth Circuits have previously held "prompt judicial review" requires a prompt decision. *See, Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791 (6th Cir. 2003); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995) (*en banc*). The City asserts that the First, Fifth, Seventh, and Eleventh Circuits have held prompt judicial review only requires prompt access to review. *See, Boss Capital, Inc. v. City of Castelberry*, 187 F.3d 1251, 1255 (11th Cir. 1999); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*); *Jews for Jesus, Inc. v. Massachusetts Bay Transport Authority*, 984 F.2d 1319,

1327 (1st Cir. 1993). See also *Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999).

However, the recent unanimous decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), partially resolved this split by distinguishing between content neutral licensing requirements and those targeting speech on the basis of its content, as the Littleton licensing requirement struck down in this case. Three of the other circuit decisions cited by Littleton as endorsing access are properly analyzed as content neutral permit regulations that do not require any *Freedman/FW/PBS* safeguards under *Thomas*, unlike the license requirement specifically targeted at businesses that present sexually explicit speech in *FW/PBS*. The First Circuit decision in *Jews for Jesus* and Second Circuit decision in *Beal* dealt with content neutral permit schemes regulating expression in public forums like *Thomas*. Similarly, the Seventh Circuit decision in *Graff* upheld a content neutral regulation of newsstands on public property.[4] Thus, of the five circuits claimed to have held that access to judicial review satisfies *FW/PBS* and *Freedman*, only two, the Fifth and Eleventh Circuits, have specifically dealt with licenses that target businesses that purvey sexually explicit material, the distinction found to be crucial in *Thomas*. See *TK's Video*, 187 F.3d 1251; *Boss Capital*, 24 F.3d 705.

Conversely, all of the cases holding a prompt judicial determination is constitutionally required under *FW/PBS*, involved ordinances that specifically focused on businesses

[4] The district court in *Illusions Too Reality, LLC v. City of Harvey*, 2003 WL 260335 (N.D. Ill. Feb. 4, 2003), apparently did not find the Seventh Circuit decision in *Graff* controlling in adopting the Tenth Circuit's reasoning in this case on the issue of prompt judicial review.

that disseminate adult materials like the licensing ordinance struck down in this case. As noted by the Tenth Circuit opinion, these decisions more faithfully apply the rationale and spirit of *Freedman* and *FW/PBS* in requiring substantive procedural safeguards to obviate the dangers of prior restraint on expression. The foregoing cases, like the Tenth Circuit opinion in this case, properly apply *Freedman* and *FW/PBS* to require that prompt judicial review requires a prompt judicial determination in order to safeguard against the erroneous deprivation of speech rights.

III. THE CITY INCORRECTLY ASSERTS THAT IT IS "UNWORKABLE" TO PROVIDE THE CONSTITUTIONALLY REQUIRED SAFEGUARDS TO PROTECT EXPRESSION

The City argues that it is "unworkable" to guarantee a prompt judicial determination and faults the Tenth Circuit for failing to suggest any methodologies to meet the constitutional requirement for licensing expressive activities. Thus, on the one hand, the City makes a separation of powers argument that the legislative branch should not, and cannot, require the judicial branch to make a prompt decision, and on the other hand, criticizes the judicial branch for not proposing a legislative solution that will protect the right to free speech.

The City apparently is not as creative in protecting speech as it is in restricting speech to limit the alleged adverse secondary effects of unpopular speech. As demonstrated by the citations to the cases above, many jurisdictions have dealt with the issue of prompt judicial review by providing for provisional licenses.

Thus, contrary to the shrill protests of the City, it is *not* impossible to license an adult business under the panel decision. Indeed, the failure is not with the appellate courts for not providing a roadmap to the City to comply with the constitutional requirements imposed by the Supreme Court in this area, but rather with the City for a failure of imagination and will to seriously attempt to fulfill constitutional standards.

The Tenth Circuit upheld many provisions of the Littleton ordinance that address the adverse secondary effects of adult entertainment establishments. The most important of these is the locational restriction which banishes such businesses to limited areas within industrial zoned areas. Even without a licensing requirement, the City of Littleton has numerous tools with which to regulate these businesses. In addition, the City remains free to enforce any criminal laws in the event that actual crimes occur in or around such businesses, and to close such businesses if they constitute a public nuisance.[5]

This Court in *Freedman* and *FW/PBS* imposed important requirements upon municipalities attempting to regulate businesses engaged in certain types of speech through the use of licenses. These requirements should not be brushed aside because it is inconvenient for the

[5] "If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708, 92 L.Ed.2d 568, 106 S.Ct. 3172 (1986) (O'Connor, J. concurring).

government to ensure that protected speech is not erroneously restrained. The Tenth Circuit decision in this case faithfully applies the decisions of this Court and protects the rights guaranteed to all citizens by the First and Fourteenth Amendments to the United States Constitution. The Petition for Writ of Certiorari should be denied.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: June 25, 2003

Respectfully submitted,

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(2)

Supreme Court, U.S.
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No. 02-1609

In the Supreme Court of the United States

THE CITY OF LITTLETON,
Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., a COLORADO LIMITED LIABILITY COMPANY d/b/a CHRISTAL'S,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program has served municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as a friend of the court on behalf of its members before this Honorable Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National League of Cities represents more than 18,000 United States cities, villages, and towns. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

[1] Pursuant to Rule 37.6, *amici curiae* International Municipal Lawyers Association ("IMLA") and National League of Cities ("NLC") disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Amici and their members are specifically concerned about the proper resolution of the issue presented by the City of Littleton's petition. The circuit court split over judicial review of licensing decisions for erotic businesses has been accurately described as an imbroglio that needs this Court's intervention. *Midvale City Corp. v. Haltom*, 2003 Utah Lexis 55 (May 16, 2003). The confusion attendant to the circuit split has impeded municipal efforts to control the adverse secondary effects of sexually oriented businesses through narrowly tailored regulations. *Amici*, as an advocate for the interests of local governments and the communities they serve, file this brief on behalf of their members nationwide. Letters from both parties consenting to the filing of this amici curiae brief are on file with the Clerk.

STATEMENT OF THE CASE

Amici adopt the statement of the case and the facts as presented by Petitioner, City of Littleton.

REASONS FOR GRANTING THE WRIT

This Court has twice granted certiorari to resolve the issue raised in the petition, but in both cases lacked occasion to reach the issue. *See Thomas v. Chicago Park District*, 534 U.S. 316, 325-326 (2002); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 281 (2001). The split in the circuits has since expanded to include the Tenth Circuit, and the reasons for granting certiorari to review its judgment below are compelling.

1. This case presents an ideal vehicle to resolve the circuit split.

First, unlike in *City News*, no specter of mootness infects this case, as respondent remains in business and the justiciable controversy between the parties continues. Indeed, even if Z.J. Gifts were to now cease operations in Littleton, the ever-increasing number of cases addressing this important issue demonstrates that the controversy is capable of repetition, although it has thus far evaded review by this Court.

Second, unlike the ordinance in *Thomas*, the Littleton ordinance is narrowly targeted – as it must be, *see Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52-53 (1986) – to regulate sexually oriented enterprises, and thus presents the question upon which the lower courts are split.[2]

[2] Two important observations are warranted here. First, the Littleton ordinance regulates the location and operation of sexually oriented *businesses*, not speech, regardless of whether the businesses engage in protected expression. Hence, the ordinance regulates non-speech businesses such as "sexual encounter centers" and day-rate motels classified as "adult motels." *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 247-248 (1990) (White, J., concurring in part and dissenting in part) ("Neither is there any basis for holding that businesses dealing in expressive materials have been singled out; all sexually oriented businesses -- including those not involved in expressive activity such as escort agencies -- are covered..."). Second, the split in the circuits goes beyond sexually oriented business regulation to include regulations of expressive conduct in other venues. *See Thomas*, *supra* at 325 (citing *Jews for Jesus v. Massachusetts Bay Transportation*, 984 F.2d 1319 (1st Cir. 1993) (expressive activity in airports) and *Graff v. City of Chicago*, 9 F.3D 1309 (7th Cir. 1993) (*en banc*) (upholding permit regulations governing newsracks).

2. The persistent confusion in the lower courts damages the interests of local governments and the communities they serve.

In recent years, cities have suffered the unwarranted invalidation of numerous local ordinances for circumstances that are beyond municipal control and for reasons that are inconsistent with this Court's rulings on time, place, and manner regulations.

Municipalities have been the losers in the midst of this ambiguity while, to the best of amici's collective knowledge, no adult business has ever been prevented from obtaining judicial review of an adverse licensing decision.

Despite the staggering impacts of rulings striking municipal ordinances for failing to guarantee a court of law's prompt decision – including facial invalidation of entire ordinances and large attorney fee awards – the judicial explanations for the "prompt judicial decision" rule in the present context have been wholly unpersuasive. On the other hand, the problems created by the rule are many.

As an initial matter, courts requiring a guarantee of prompt court decision have either, like the Tenth Circuit, have ignored the obvious – that a city can guarantee no such thing – or have held that despite the impossibility of the requirement, the local ordinance must be invalidated anyway. *See Mai Lee Le v. City of Citrus Heights*, 1999 U.S. Dist. Lexis 13477, *24 (E.D. Cal. 1999) (unpublished) ("In sum, *Freedman* and *Baby Tam and Co.* insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – however impractical they may be – are the law.")

Second, the "local-legislatures-must-control-judicial-dockets" concept underlying the prompt judicial decision rule runs headlong into limitations on municipal authority as well as the separation of powers doctrine. As the Sixth Circuit observed: "Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893-894 (6th Cir. 2000). The court in *Mai Lee Le*, *supra* at 23, noted the separation of powers problem that would arise if state legislatures were to inject limitations on courts' constitutional adjudications. *Mai Lee Lee*, supra at 23 ("It has been suggested that the California Legislature would [prescribe judicial deadlines] – at least with respect to state judicial officers – but even the state's authority is doubtful.")

The third harm manifested in decisions requiring a city to guarantee prompt judicial decisions is a not-so-subtle disparagement of city officials and state courts. *Amici* are particularly concerned about the view, espoused by the Tenth Circuit in this case, that city officials are either incompetent or, worse, unwilling to follow the clear and objective requirements of their own ordinances. After the lower court recognized that the impetus for *Freedman* analysis (censorship) was inapposite to this case, the court nevertheless opined:

> Even if the rationale behind Freedman is specific to censorship cases, there is an equally valid rationale for requiring prompt judicial review in adult-business licensing cases.... A licensing official *may have little or no discretion in reviewing an application, but he or she may be tempted nonetheless to overstep the bounds of the ordinance*.

311 F.3d at 1238 (emphasis supplied).

This speculation, an attack on the integrity of public officials, is wholly unwarranted and unsupported by any facts relevant to this case. Indeed, if the lower federal courts can simply presume bad faith on the part of public officials, it matters not what procedural protections appear on the face of ordinances – federal courts may, by fiat, act as though they do not exist. The invalidation of ordinances would be justified simply based on the courts' hypothesis that:

> [T]he *possibility* exists that licensing officials *might* allow their personal views on the morality of sexually explicit entertainment *to sway* a decision on an application. Given the *strong feelings* that adult businesses can engender, there must be a prompt judicial determination to ensure that licensing officials do not exceed their authority under the ordinance *in their zeal* to protect the community.... [T]he danger that an ordinance like Littleton's may be improperly used as a *subterfuge for censorship* is too great to overlook....

Id. (emphasis supplied).

In light of the foregoing, one must wonder how such conjecture - which paints public officials as incapable of following clear ordinance standards - could serve as the "equally valid rationale" that justified invalidation of the Littleton judicial review provisions. *Amici* submit that not only is this unjustified speculation foreign to sound constitutional analysis, but that it is also contrary to this Court's view that public officials are entitled to "a presumption of honesty and integrity," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), in the absence of facts to the contrary.

This unsupported view of public officials, however, is not limited to municipal employees. The "prompt judicial decision" courts have also suggested that state courts hearing factual or constitutional challenges to licensing decisions are not responsive to constitutional requirements.

For example, the Sixth Circuit – rejecting the judicial review provided under Kentucky law – stated that "we cannot be sure that a state judge, *who often is elected* and toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner." 202 F.3d 884, 892 (6th Cir. 2000) (emphasis added) (rejecting district court's assumption that state court would speedily issue injunctive relief if risks to constitutional rights made it necessary). Again, the expressed presupposition – inherently damaging to federal-state relations – is that state judicial officers are less than competent to act swiftly to protect constitutional rights.

This view is no more than "an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the Constitution of the United States." *Steffel v. Thompson*, 415 U.S. 452, 460-62 (1974).

Finally, perhaps the most obvious vice of the prompt judicial decision rule – when applied in a content-neutral context for which is it was not designed – is that it eviscerates prophylactic measures designed to prevent the secondary effects of sexually oriented enterprises. Some "prompt decision" courts have suggested that, to solve "prior restraint"[3] restraint problems, cities can simply give

[3] This case also gives the Court the opportunity to clarify the prior restraint doctrine. The decision in *Thomas v. Chicago Park*

provisional licenses to adult businesses that seek judicial review of adverse licensing decisions. *See Nightclubs*, *supra* at 894; *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 1001 n. 18 (4th Cir. 1995) (*en banc*).

The most obvious defect in these judicial suggestions is that they require municipalities to passively allow the unregulated environments that foster secondary effects while the businesses – protected by provisional licenses pursuant to ordinances under which they are objectively unqualified – pursue (at a slower pace, no doubt) judicial resolution of their claims.

For example, most adult business licensing ordinances prohibit the employing of minors in an adult business. If a business applicant were recently convicted of knowingly employing a minor in a sexually oriented business,[4] the City

District, 534 U.S. 316 (2002) reiterated that "prior restraint" analysis should not be invoked for every regulation that requires a permit before engaging in an activity which may or may not be associated with expression. Rather, prior restraint – at its core – involves either content-based censorship of expressive materials or unbridled discretion in which amorphous standards serve as a mask for censorship. *Id.* at 320-321. This case involves neither vice. As the Tenth Circuit observed, the Littleton ordinances gives officials "little or no discretion in reviewing an application." 311 F.3d at 1238. *See also*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-230 (1990) ("Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.")

[4] *See, e.g.*, Daniel Borunda, *Police Find 4 Teenage Strippers*, El Paso Times, May 30, 2003, at A1 ("In an affidavit for that search warrant, another 15-year-old girl described a 'don't ask/don't tell'

would deny a license to the business on this objective, content-neutral ground. In a "prompt judicial decision" jurisdiction, however, the City would be required to give a provisional license to the applicant, which would go beyond maintaining the status quo to allowing the club to open and operate until the conclusion of its lawsuit. *See Nightclubs*, *supra*, at 894 (holding that "a city may very well have to go beyond merely maintaining the status quo and actually permit" the operation of the business.") But this presents the obvious problem of permitting an unqualified – or improperly zoned, or habitually offending, etc. – adult business to operate when valid reasons, having nothing to do with speech, would justify license denial.

Moreover, even granting provisional licenses to unqualified businesses is no guarantee that an ordinance will be upheld under the "prompt judicial decision" rule. Indeed, some courts have – even after suggesting a provisional license remedy, *see Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir. 2000) – continued to invalidate ordinances, notwithstanding that the ordinances provide a provisional license or a stay of enforcement allowing aggrieved applicants to operate *until the conclusion of judicial review*. *See Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001) (holding that local government must guarantee prompt judicial decision, notwithstanding ordinance provision barring enforcement until a court's ruling on the merits); *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791 (6th Cir. 2003) (holding that temporary permit allowing operation during judicial review was insufficient).

environment, in which she was offered cocaine by customers and had sex with patrons for money in 'VIP' rooms.").

In essence, as applied to adult business licensing ordinances that otherwise satisfy intermediate scrutiny, the "prompt judicial decision" rule says this: Even when a license denial is completely unrelated to the suppression of expression and narrowly tailored to serve a significant government interest (as it must be to satisfy the time, place, and manner test[5]), cities must either guarantee prompt judicial decisions on appeals from license denials (an impossibility), give provisional licenses to unqualified businesses (a capitulation of their regulatory interests which may or may not suffice), or risk invalidation of their ordinances (a total loss).

Amici's concern over this imbroglio is heightened due to recent expansion of the "prompt judicial determination" requirement to encompass content-neutral license suspensions and revocations which, by definition, are sanctions imposed

[5] Neither party is suggesting that adult business licensing ordinances do not have to satisfy the four-part test for time, place, and manner regulations of expressive conduct. That is, they must: (1) be justified by content-neutral reasons, (2) be designed to serve substantial government interests, (3) be narrowly tailored to serve those interests (e.g., must not restrict substantially more speech than necessary to advance those interests), and (4) must leave open adequate alternative avenues of communication. *See City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968) (stating test in slightly different language). More important, as discussed below, this Court has recently reiterated that there are procedural requirements that inhere in the time, place, and manner test. *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). That is, the regulations must "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* at 323. Amici contend that these substantive and procedural standards are more than sufficient to satisfy the First Amendment when an adult business challenges a content-neutral license denial.

subsequent to, not prior to, expressive activity. *See,e.g., 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (allegedly implementing "the policy consideration underlying this [prompt judicial decision] safeguard" by extending prior restraint analysis to content-neutral licensing sanctions *subsequent* to licensure and operation) (brackets and emphasis supplied).

This Court addressed the fundamental distinction between initial licensing and post-permit enforcement of content-neutral regulations in *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, (2001):

> Full briefing and argument have revealed that the question City News tendered, and which we took up for review, is not now and never was accurately reflective of City News's grievance. Unlike the initial license applicant whose expression cannot begin prepermission (the situation of the complainant in *Freedman*), City News was already licensed to conduct an adult business and sought to fend off a stop order.

Id. at 285; *accord Alexander v. United States*, 509 U.S. 544 (1993) (distinguishing censorial prior restraints from valid sanctions that impact future speech); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (same); *see also Jakes, Ltd., Inc. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002) ("Jake's cites no authority for the proposition that the prior restraint standards of City of Lakewood and FW/PBS apply equally to license suspensions and revocations. The proposition is inherently suspect, because license revocation is necessarily less of a *prior* restraint than the initial licensing process.")

The confusion engendered by the "prompt judicial review" rule, as applied not only to initial licensing decisions

based on content-neutral regulations, but also to *post*-licensure sanctions under those regulations, is an additional reason that this Court should grant certiorari and resolve the split in the circuits.

***

Amici submit that each of the foregoing problems warrant this Court's intervention. The greatest problem, however, with requiring cities to guarantee a "prompt judicial determination" is not the requirement's admitted impossibility, its obvious conflict with separation of powers, its anti-federalism underpinnings, nor even its evisceration of municipal authority to control secondary effects.

Rather, the fundamental problem is that this necessary safeguard for content-based prior restraint schemes has no coherent analytical life when detached from its censorship roots. Its inapposite application to ordinances which do "not authorize a licensor to pass judgment on the content of speech," *Thomas*, *supra* n.5 at 322, generates more problems than it attempts to solve. In a typical adult business ordinance that otherwise meets intermediate scrutiny, e.g., where "[n]one of the grounds for denying a permit has anything to do with what a speaker might say," *id.*, the prompt judicial decision rule unnecessarily thwarts municipal planning and regulation of secondary effects to the detriment of communities. As discussed below, the First Amendment does not require such a result.

3. This Court's precedents provide a well-balanced solution to the judicial review quandary.

Amici submit that this Court's ruling in *Thomas* offers a coherent solution to the circuit split and should guide its

resolution of this case. Specifically, *amici* urge the Court to grant certiorari and rule that content-neutral time, place, and manner regulations for sexually oriented businesses are constitutional provided that they: (1) avoid unfettered discretion (including undue delay in permitting decisions), (2) allow prompt access to effective judicial review, and (3) otherwise meet the test for content-neutral time, place and manner regulations. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

This is the appropriate standard, despite the fact that adult business ordinances identify the sexual nature of the regulated businesses by reference to the materials sold and performances offered. Indeed, under this Court's precedents, they *must* do so in order to be narrowly tailored toward secondary effects and avoid unconstitutional overbreadth.

Twenty-seven years ago, this Court decided its first case concerning local zoning and licensing controls employed to prevent the admittedly serious problems caused by establishments classified as "adult" businesses. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1974). Rejecting the adult theaters' assertion that Detroit's licensing requirement constituted an impermissible prior restraint, a majority of the Court held that the city's classification of theaters specializing in erotic fare was justified by the city's desire to control the adverse impacts of those commercial enterprises. *Id.* at 62-63 ("[T]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and licensing requirements is not a sufficient reason for invalidating these ordinances.")

Ten years later, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court reiterated that such

classification was necessary to ensure that the city's regulation was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." *Id.* at 52.

Municipalities which have adhered to these cases should not have to suffer the continued invalidation of ordinances which do not permit censorship, do not vest city staff with unbridled discretion, and do not otherwise run afoul of intermediate scrutiny simply because those ordinances are narrowly tailored to address specific secondary effects engendered by a particular category of businesses. Such narrow tailoring should not make content-neutral regulations subject to extraordinary requirements – such as guaranteeing prompt court decisions – that are borne of a censorship context.

CONCLUSION

For the foregoing reasons, your *Amici* urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 02-1609

In The Supreme Court of the United States

THE CITY OF LITTLETON,

Petitioner,

v.

ZJ GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTION PRESENTED

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) entails a prompt judicial determination or a prompt commencement of judicial proceedings.

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The Tenth Circuit's opinion is published at *ZJ Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). (Pet. App. 1-39).[1] The Tenth Circuit's *Order* denying Petitioner's petition for rehearing en banc is unpublished. (Pet. App. 68-69). The District Court's *Order and Memorandum of Decision* is unpublished. (Pet. App. 40-67).

JURISDICTION

The Tenth Circuit denied Petitioner's timely petition for rehearing en banc on February 5, 2003. (Pet. App. 68-69). The *Petition for a Writ of Certiorari* was filed on May 2, 2003, and was granted on October 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech. . . ."

Article III of the Colorado Constitution, entitled "Distribution of Powers," provides:

> The powers of the government of this state are divided into three distinct departments,—the

[1] "Br. App. ___ a" refers to the appendix attached to the Brief of Petitioner. "Pet. App. ___" refers to the appendix attached to Petitioner's Petition for a Writ of Certiorari. "R. ___" refers to the record.

> legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

42 U.S.C. § 1983 is reproduced at Br. App. 48a; Section 13-51-105, Colo.Rev.Stat. (2003) is reproduced at Br. App. 48a.

Littleton's Adult Entertainment Establishment ordinance ("the Ordinance")[2] is reprinted in its current form in the appendix to this brief at Br. App. 12a-42a. The Ordinance has been amended three times since it was enacted in 1993. The Ordinance in its original form is contained in the petition appendix at pages Pet. App. 75-111. The Ordinance was amended on June 19, 2001, and this amendment is contained in the petition appendix at pages Pet. App. 112-116.

Littleton calls the Court's attention to two other amendments which have been made to the Ordinance which, while relevant to the issues in the case at bar, do not affect the question on which this Court granted certiorari. *See Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (per curiam) (this Court will "review the judgment . . . in light of [the] law as it now stands, not as it stood when the judgment below was entered") (citing *Hall v. Beals*, 396 U.S. 45, 48 (1969)); *see also Fusari v. Steinberg*, 419 U.S. 379, 387 n.12 (1975) (noting duty of counsel to inform the Court of amendments to the subject legislation after grant of certiorari).

[2] Also referred to as Littleton Colo. City Code § 3-14-1 (2003) *et seq.* Hereinafter the Littleton City Code shall be referred to as "LCC." References are to the Ordinance in its current form, unless otherwise noted.

The Tenth Circuit invalidated and severed, § 3-14-5(A) (Pet. App. 91) and LCC § 3-14-5(B)(10) (Pet. App. 93-94), which dealt with photographing and fingerprinting of license applicants and zoning certification. Littleton thereafter amended these provisions and LCC § 3-14-7 on June 3, 2003, and these amendments are at Br. App. 1a-4a. The Ordinance was amended most recently on November 18, 2003, and these amendments are at Br. App. 5a-11a. In relevant part, the amendments to LCC §§ 3-14-5(A)(B), 3-14-7 and 3-14-8 shorten even further the limited time periods within which city officials must act. LCC § 3-14-5(B) now requires the applicant to submit photographs and fingerprints with the application, thereby eliminating City involvement and any possible delay in the process. (Br. App. 23a-26a). LCC § 3-14-7 now requires that within five business days of the filing of an application, the zoning official shall issue a report confirming adherence to the locational requirements. Upon any failure to timely issue said report, the city clerk shall presume the proposed location is proper. (Br. App. 27a-28a). Additionally, if "any city official or department fails to render a timely decision pursuant to the terms of the ordinance, then said official or department shall be deemed to have approved or consented to the issuance of the requested license." LCC § 3-14-8(C) (Br. App. 30a).

STATEMENT

The Ordinance's Background and Purpose

The City of Littleton is a Colorado home-rule municipal corporation. The Ordinance, as originally passed in 1993, sets forth zoning and licensing requirements with regard to adult businesses. (Pet. App. 75-111). Before passing the Ordinance, the City Council considered evidence of the adverse secondary impacts of adult businesses, including increased crime, decreased property values, and urban blight. (Pet. App. 75-79, 82). As detailed in the legislative history and as memorialized in the preamble, the purpose and intent of the Ordinance is to prevent the deleterious secondary effects of adult businesses in the City. (Pet. App. 75-79, 82). On its face, as well as in its operation and effect, the Ordinance does not impose any limitations on the content of communicative materials or restrict adult access to protected speech. Moreover, the Ordinance targets secondary effects, not sexually explicit speech as such, by regulating adult businesses regardless of whether they feature protected expression.[3]

The first and second readings of the Ordinance were open to the public and held before the Littleton City

[3] The Ordinance governs adult motels, sexual encounter establishments and nude model studios. These types of adult businesses do not fall under the penumbra of First Amendment protections. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (plurality) (noting that "sexual encounter centers" are not protected); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 447 (2002) (Kennedy, J., concurring in the judgment) (discussing massage parlors and other businesses not engaged in conduct commonly associated with expression).

Council on July 20, 1993, and on August 13, 1993, respectively. (R. 74). Various documents were disseminated to council members including: (1) a legal analysis of relevant case law; (2) specific proposals regarding sections of the Ordinance; (3) Littleton's zoning maps, which demarcated residential, business and industrial zones; (4) the proposed Ordinance; and (5) summaries of land-use studies documenting the secondary effects of adult uses. (R. 74, 117-148, 176). Littleton's assistant city attorney also discussed the right of adult businesses to open and operate in the City, balanced with the City's substantial interests in regulating the time, place and manner of such operations to prevent secondary effects. (R. 143-148). In an open forum, Littleton's City Council analyzed the Ordinance's various provisions, as well as the documentation which detailed the adverse secondary impacts associated with adult businesses. Several individuals spoke before the City Council. (R. 149-175). Following these hearings, Council passed the Ordinance.

Littleton's Adult Entertainment Establishment Ordinance

As noted above, in passing the Ordinance, Littleton relied upon the negative impact that other municipalities experienced related to adult businesses. LCC § 3-14-1 (Pet. App. 75-79, 82). To prevent such secondary effects, Littleton's Ordinance requires adult businesses to obtain a license, LCC § 3-14-4, and comply with specified time, place, and manner regulations. (Br. App. 23a). The Ordinance defines a variety of establishments specializing in sexually explicit fare including adult bookstores, adult cabarets and "sexual encounter centers." LCC § 3-14-2 (Br. App. 12a-20a).

The Ordinance sets forth eight specific, non-discretionary grounds upon which a license can be denied. LCC § 3-14-8(A) (Br. App. 28a-29a).[4] These standards foreclose any possibility that a licensing official's subjective views or personal opinions would affect any licensing decision. None of the grounds for denying a license in Littleton has anything to do with what the speaker might say.

Although the administrative time frames are not in dispute, LCC § 3-14-8(B) (Br. App. 29a-30a) sets forth brief time periods for the administrative process and ensures expeditious and mandatory judicial review in state court

[4] LCC § 3-14-8(A): The application of any applicant shall be approved or denied by the city clerk within fourteen (14) days of the date the application is filed with the city clerk. The city clerk shall deny a license if: (1) The applicant is under the age of eighteen (18) years; (2) The applicant has made a false statement upon the application or has given false information in connection with an application; (3) The applicant or any holder of any class of stock, or a director, officer, partner or principal of the applicant has had an adult business license revoked or suspended anywhere within the state within one year prior to the application; (4) The applicant has operated an adult business which has [been] determined to be a public nuisance under state law or this code within one year prior to the application; (5) A corporate applicant is not in good standing or authorized to do business in the state; or (6) The applicant is overdue in the payment to the city of taxes, fees, fines, or penalties assessed against him/her or imposed against him/her in relation to an adult business; (7) The applicant has not obtained the required sales tax license; (8) The applicant has been convicted of a specified criminal act within the five year period prior to the date the application is filed with the City Clerk. (Br. App. 28a-29a).

Specified criminal acts are defined in the Ordinance in LCC § 3-14-2 as "[s]exual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, or pandering." (Br. App. 19a).

pursuant to Colo.R.Civ.P. 106(a)(4) (Br. App. 43a-47a).[5] The Ordinance provides for a maximum of 40 days from the time an application is submitted until an action pursuant to Colo.R.Civ.P. 106(a)(4) can be commenced. LCC § 3-14-8(B)(1-3) (Br. App. 29a-30a). An application shall be approved or denied within fourteen days of the date the application is filed with the city clerk. LCC § 3-14-8(A) (Br. App. 28a-29a). In the event of a denial, written findings of fact stating the basis for the denial shall be sent first class to the address shown on the application. LCC § 3-14-8(B) (Br. App. 29a). The applicant shall have the right to a hearing before the city manager, provided the request is made within ten days. LCC § 3-14-8(B) (Br. App. 29a). The hearing shall be held within fourteen days, and allows for statements and other evidence from enforcement officers, the applicant or other parties in interest and shall be held within fourteen days. LCC § 3-14-8(B) (Br. App. 29a). The city manager must issue an order based upon findings of fact within two days. LCC § 3-14-8(B)(2) (Br. App. 29a-30a).

Under Colo.R.Civ.P. 106(a)(4), any denial of a license which is affirmed by Littleton's city manager may be immediately appealed to state district court. The rule provides for mandatory review in the nature of certiorari. Pursuant to Colo.R.Civ.P. 106(a)(4)(VIII), the district court can accelerate the action if the court determines that acceleration is appropriate. Relief is available on Sundays and holidays. The court may also provide injunctive relief under Colo.R.Civ.P. 106(a)(4)(V) and Colo.R.Civ.P. 65. Moreover, the parties may challenge the constitutionality

[5] This does not preclude relief in the nature of mandamus under Colo.R.Civ.P. 106(a)(2) or injunctive relief in state or federal courts.

of ordinances under Colo.R.Civ.P. 106(a)(4). *Tri-State Generation and Transmission Co. v. City of Thornton*, 647 P.2d 670, 676 n.7 (Colo. 1982).

Through its narrowly tailored provisions, the Ordinance seeks to target the adverse secondary effects. For example, adult businesses are prohibited from allowing minors on the premises. The Ordinance also contains minimum lighting and interior configuration requirements designed to prevent sexual activities on the premises. LCC §§ 3-14-15, 3-14-16, and 3-14-17 (Br. App. 37a-41a).

Littleton's Ordinance also targets the negative secondary effects which spawn from adult businesses through its locational requirements. Littleton is divided primarily into three zoning categories—residential, business (including, in part, the B-2 zone) and industrial (including I-1 and I-2 zones).[6] Subject to certain distance requirements between churches, schools or childcare facilities, parks and correctional facilities, adult businesses are afforded a full opportunity to operate in Littleton's I-1 and I-2 zoned districts. LCC § 3-14-3 (Br. App. 21a-22a).

[6] The zoning requirements, upheld by the District Court and the Tenth Circuit, are not at issue here and, therefore, are described only peripherally.

The District Court and Tenth Circuit Proceedings

In August 1999, ZJ's opened an adult business[7] in a B-2 zoned district, which is not a zone district allowing for adult entertainment establishments, and has continued to operate since that time. Littleton took no action to prevent ZJ's opening. Upon opening, without applying for or having been denied an adult business license, ZJ's brought an action under 42 U.S.C. § 1983, challenging Littleton's Ordinance as unconstitutional on several theories, including void for vagueness, overbreadth, and prior restraint. ZJ's sought declaratory and injunctive relief, damages and attorneys' fees. (R. 8-28).

Littleton filed its motion for summary judgment (R. 70-115) and ZJ's filed its cross-motion for summary judgment. (R. 373-422). ZJ's primarily argued that it was not an adult business, that there were not enough I-1 and I-2 zoned sites in Littleton for adult businesses, and that the licensing provisions were an unconstitutional prior restraint. (R. 373-422).

The lower courts flatly rejected ZJ's contention that it is not an "adult business."[8] The District Court specifically

[7] ZJ's is an "adult bookstore, adult novelty store or adult video store" pursuant to LCC § 3-14-2. (Br. App. 13a-14a) (Pet. App. 83).

[8] As noted above, ZJ's falls under Littleton's definition of "adult bookstore, adult novelty store, or adult video store" in LCC § 3-14-2, which derives from the Detroit definition of "adult book store" detailed in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 54 n.5 (1976), and reads as follows: "A commercial establishment which (a) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; (b) receives a significant or substantial portion of its revenues from; or (c) devotes a significant or substantial portion of its advertising expenditures to the promotion of: the sale, rental or viewing of . . .

(Continued on following page)

noted that ZJ's restricts access to its store to adults and accordingly found that ZJ's considered itself an adult business. (Pet. App. 51). Moreover, it was undisputed that ZJ's sells a plethora of adult magazines, videos and other merchandise which vividly display anuses, vaginas, penises and closeups of sexual activities such as penial/vaginal contact, penial/anal contact, penial/mouth contact and ejaculation. (R. 213-284, 375). A review of a videotape tour of ZJ's, as well as floor plans, schematic drawings, affidavits and reports from city personnel, a detailed financial analysis of sales, products, and income derived from adult products by a certified public accountant, inventory and layout photographs, and ZJ's inventory lists made clear to the court the pervasively sexual nature of ZJ's business. (Pet. App. 51-52) (R. 213-372, 581 and Supplemental Appendix Vol II). The court found that ZJ's argument that it was not an adult business was "frivolous at best" and the court held that to define ZJ's as "anything

(items) which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas' . . . " (Br. App. 13a-14a) (Pet. App. 83).

Specified anatomical areas are defined as: "(A) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areolae; or (B) Human male genitals in a discernibly turgid state, even if completely and opaquely covered." (Br. App. 19a) (Pet. App. 87-88).

Specified sexual activities are defined as: "(A) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts; (B) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (C) Masturbation, actual or simulated; or (D) Human genitals in a state of sexual stimulation, arousal or tumescence; (E) Excretory functions as part of or in connection with any of the activities set forth in subsections (A) through (D) of this definition." (Br. App. 19a-20a) (Pet. App. 88).

other than an adult entertainment establishment would be absurd and totally devoid of any basis on the record." (Pet. App. 51-52).[9] The court was sufficiently "disturbed by the frivolous and incredulous argument" made by ZJ's that it cautioned ZJ's counsel concerning Fed.R.Civ.P. 11. (Pet. App. 55 n.2).

Following *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the court found that Littleton's Ordinance "is narrowly tailored to serve a significant governmental interest. . . ." (Pet. App. 60). Rejecting ZJ's contention that there are not enough available sites, the court found that there is sufficient land available for adult uses, i.e., that the Ordinance "leaves open ample alternative channels of communication." (Pet. App. 60-63).

In granting Littleton's motion for summary judgment, the District Court discussed the rationale of this Court's prior restraint cases and concluded that the Ordinance is not a prior restraint of protected speech. The court specifically held that the Ordinance does not place unbridled discretion in the hands of Littleton officials to either

[9] The District Court found: "Plaintiff's estimate that thirty-three percent of its business is adult or sexual in nature appears to be far below the actual figure. Defendant has submitted evidence suggesting that the portion of Plaintiff's inventory that is sexual and adult in nature is closer to fifty percent. (Def.'s Br., Ex. D [Video], Ex. E [Photographs], Ex. F [Inventory List], Ex. G [Expert Reports].) After reviewing the photographs taken of the display cases in Plaintiff's store and the video segment touring the store, I find Plaintiff's argument that it is not an adult entertainment establishment frivolous at best. To define Plaintiff as anything other than an adult entertainment business would be absurd and totally devoid of any basis on the record." (Pet. App. 51 n.1).

approve or deny a license, that it requires a licensing decision in a brief, specified period of time, and that it, when combined with Colo.R.Civ.P. 106, provides adequate procedural safeguards, including an avenue for prompt judicial review. (Pet. App. 63-65). The court concluded that ZJ's did not have standing to challenge the constitutionality of the Ordinance under the void for vagueness doctrine, but that in any event, Littleton's Ordinance was not void for vagueness or overbroad. Ultimately the court dismissed all of ZJ's claims. (Pet. App. 40-67).

ZJ's appealed the District Court's Order in its entirety to the Tenth Circuit. The Tenth Circuit affirmed in part and reversed in part. (Pet. App. 1-39). Having reviewed the District Court record, including the videotape of the interior of ZJ's business, the Tenth Circuit concluded that ZJ's was "unquestionably" an adult business. (Pet. App. 12 n.6). Drawing all inferences in favor of ZJ's, the Tenth Circuit agreed with the District Court that Littleton, whose real estate expert identified more than twenty sites where ZJ's could legally operate, provided sufficient land zoned for adult businesses. (Pet. App. 33-38). The Tenth Circuit also concluded: ZJ's lacked standing to challenge the Ordinance's civil disability provisions, as well as the Ordinance's revocation and suspension provisions (Pet. App. 11); the Ordinance was not void for vagueness (Pet. App. 12-14); and the Ordinance does "not involve discretion on the part of the licensing official." (Pet. App. 29 n.13).

The Tenth Circuit did find for ZJ's on two of its challenges to the licensing provisions. First, the Tenth Circuit found that, notwithstanding the 30-day deadline for licensing decisions, the failure to specify a time frame for the zoning official to issue a statement of compliance,

section LCC § 3-14-5(B)(10), or for the Police Department to take an applicant's photograph and fingerprints, section LCC § 3-14-5(A), created a risk of undue delay. (Pet. App. 22-23). These requirements were severed from the Ordinance by the Tenth Circuit and, as noted above, were subsequently amended. (Pet. App. 20-24). Second, of particular relevance here, the Tenth Circuit ruled that *FW/PBS* mandates that a city guarantee that a judge issue a prompt decision upon judicial review of a license denial. (Pet. App. 25-33). Because Colo.R.Civ.P. 106(a)(4) permits, but does not require, a "prompt final decision," (Pet. App. 32), on a court challenge to a license denial, the Tenth Circuit invalidated Littleton's judicial review provision.

Littleton then filed a petition for rehearing en banc (Pet. App. 117-132) which was denied. (Pet. App. 68-69). ZJ's filed a petition for rehearing which was also denied.

SUMMARY OF ARGUMENT

I. The plurality opinion in *FW/PBS* emphasized the distinctions between censorship schemes designed to prohibit speech based on content and licensing procedures designed to implement content-neutral time, place, and manner regulations. 493 U.S. at 229. The former are presumptively invalid under the First Amendment and require prompt judicial determinations to ensure that a censor has not erred in determining "that the [expression] is unprotected." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). In the latter, however, an official "does not exercise discretion by passing judgment on the content" of expression, but rather applies narrow, objective standards to further content-neutral interests, "a ministerial action

that is not presumptively unconstitutional." *FW/PBS*, 493 U.S. at 229; *id.* at 246 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part). Thus, the *FW/PBS* plurality held that "[l]imitation on the time within which the licensor must issue the license as well as the *availability* of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *Id.* at 230 (emphasis supplied) (citation omitted).

There is no basis to retreat from the view of the *FW/PBS* plurality and extend the "prompt judicial determination" requirement to encompass appeals from ministerial licensing rulings. Neither rationale of the *Freedman* approach is present in this case. Under Littleton's Ordinance, the licensing official applies objective standards which do not require the judicial expertise necessary to draw "the line between legitimate and illegitimate," or unprotected, speech. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). Nor is self-censorship afoot. Whereas a license denial in a censorship scheme may discourage the speaker from seeking judicial review, *FW/PBS* recognized that such is not the case with ministerial licensing decisions where an entire business is at stake. *FW/PBS*, 493 U.S. at 229-230. Moreover, because Littleton's standards are specified and clear, any error in a licensing decision would be obvious and "remedied promptly by judicial intervention." *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 284 (Colo. 1995) (detailing availability of prompt judicial review under Colo.R.Civ.P. 106(a)(4)).

ZJ's arguments for expanding the "prompt judicial decision" requirement to this context are unavailing. First, ZJ's newly-minted "unbridled discretion" argument—

based on an unsuccessful claim that the definition of adult bookstore is vague—is waived because it was never presented in the lower courts. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Moreover, the argument is irrelevant to the prior restraint doctrine, which is concerned not with whether the Ordinance covers ZJ's store, but with whether the city has unbridled discretion "in deciding *whether or not to withhold a permit*." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969) (emphasis supplied).

ZJ's second argument, alleging that the Ordinance is a "content-based" prior restraint, fails for the same reason: while some adult businesses are covered by the Littleton Ordinance by virtue of their specialization in sexually explicit fare, content plays no role whatsoever in the decision to grant or withhold a license. More important, ZJ's assertion is contrary to all of the relevant decisions from this Court, which hold that adult business ordinances targeting secondary effects are to be evaluated as content-neutral under this Court's test for time, place, and manner regulations. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Littleton's Ordinance does not control the content of any speech and is "*justified* without reference to the content of the regulated speech." *Id.* at 48 (alteration in original) (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Finally, the Court's cases teach that targeting the secondary effects of adult businesses makes Littleton's Ordinance narrowly tailored, not content based. *City of Renton*, 475 U.S. at 52 (noting that by targeting adult businesses, Renton's ordinance avoided the overbreadth flaw identified in previous cases). Thus, Littleton's Ordinance is more appropriately analyzed as a time, place,

and manner regulation. *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002).

The Littleton Ordinance contains narrow, objective standards "to guide the official's decision and render it subject to effective judicial review." *Id.* at 323. The eight specific grounds for license denial specified in the Ordinance, LCC § 3-14-8(A) (Br. App. 28a-29a), are relevant not to content, but to the city's time, place, and manner regulations and "do not involve discretion on the part of the licensing official." (Pet. App. 29 n.13). Thus, "*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation . . ." *Thomas*, 534 U.S. at 322. Moreover, the Ordinance contains fixed administrative time limits for the licensing decision, thus avoiding the "undue delay" problem found in the Dallas ordinance in *FW/PBS*. Under LCC § 3-14-8, the City will complete its review of an application, *both* as an initial matter and on administrative appeal, within 40 days. Immediately thereafter, an aggrieved applicant may promptly commence judicial proceedings pursuant to Colo.R.Civ.P. 106(a)(4), under which the district court can grant interim relief or entertain constitutional claims. *City of Colorado Springs*, 896 P.2d at 282-284. The ministerial nature of the City's licensing decision, the procedural protections provided in the Ordinance, and the availability of prompt, effective judicial review under state law all counsel against imposing a "prompt judicial determination" requirement in this context.

II. Such a requirement would be inherently unworkable. City councils, as well as state legislatures, are precluded by the separation of powers from imposing constraints on the judiciary. *See In the Interest of J.E.S.*, 817 P.2d 508, 511 (Colo. 1991) (holding that "the courts must be independent, unfettered, and free from directives, influence, or interference" from the legislature). Moreover, such a vast expansion of the *Freedman* line of cases would produce perverse results that harm municipal and judicial interests. As an initial matter, a "prompt judicial decision" rule would elevate the protections given to sexually oriented businesses above those afforded political speech at the core of the First Amendment, contrary to this Court's consistent recognition that the interests involved here are "of a wholly different, and lesser, magnitude" than the interest in protecting discourse on matters of public concern. *Young*, 427 U.S. at 70; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 293 (2000).

A prompt judicial decision rule would also eviscerate municipalities' ability to control secondary effects through objective licensing procedures that implement content-neutral time, place, and manner regulations. Accepting ZJ's view that any adult business has the *per se* right to operate until a court concludes otherwise would undermine cities' substantial interest in preventing the decreased property values, crime, and urban blight associated with sexually oriented businesses—an interest properly characterized an "undeniably important." *City of Erie*, 529 U.S. at 296. The procedural "band-aids" suggested by the lower courts have just this effect. While a "provisional license" to allow an unqualified or offending business to continue operation during judicial review certainly obviates any restraint, the countervailing harm to the public interest—absent in the *Freedman* line of cases—is substantial. Respondent, failing to recognize the sea change its view would work in municipal law and the role of the courts, also ignores the myriad of other constitutionally permissible regulations that its rule would invalidate. *See, e.g., Jews for Jesus, Inc. v. Massachusetts Bay Transp.*

Authority, 984 F.2d 1319, 1327 (1st Cir. 1993) (considering permit requirement for noncommercial expressive conduct, and construing *FW/PBS* to require only access to prompt judicial review); *Graff v. City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993) (en banc) (construing *FW/PBS* in context of newsrack permit ordinance). The First Amendment does not compel such a result when municipalities implement time, place, and manner regulations pursuant to objective, content-neutral licensing standards.

ARGUMENT

I. Under *FW/PBS*, Littleton's Ordinance Satisfies the First Amendment Because It Provides for Prompt Commencement of Judicial Review.

This Court's cases establish that a "city may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988); *Young*, 427 U.S. at 62 ("The fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances"). The settled rule is that a licensing mechanism for enforcing time, place, and manner regulations is constitutional if it contains narrow, objective standards that "guide the official's decision and render it subject to effective judicial review." *Thomas*, 534 U.S. at 323.

However, a "licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the

like." *Id.* at 322-323 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951)). When censorship is afoot, this Court has required stringent safeguards to protect freedom of expression. Thus, *Freedman* held that a state board of censors had the burden of securing a prompt judicial decision confirming an order prohibiting exhibition of a film. *Freedman*, 380 U.S. at 58; *see also Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141 (1968) (per curiam) (requiring "a prompt judicial decision *on the question of the alleged obscenity* of" a work that has been censored) (emphasis supplied); *Southeastern Promotions*, 420 U.S. 546 (applying requirement to a municipal review board operating with unbridled discretion to determine, based on content, the stage productions that could occur at municipal theaters).

In contrast to decisions addressing content-based censorship schemes, this Court did not impose the "prompt judicial determination" requirement when it reviewed an adult business licensing ordinance in *FW/PBS*, 493 U.S. 215. Justice O'Connor's opinion for the plurality emphasized the distinction between censorship schemes and objective licensing standards that implement content-neutral regulations: "[T]he city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, *a ministerial action that is not presumptively invalid*." *Id.* at 229 (emphasis supplied); *see also id.* at 246 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (noting that Dallas ordinance did "not vest undue discretion" in deciding whether to grant a license). Thus, the licensing procedure "does not present the grave 'dangers of a censorship system.'" *Id.* at 228 (quoting *Freedman*, 380 U.S. at 58).

The plurality accordingly concluded that the First Amendment requires a municipality to guarantee only the "possibility" or "availability" of "prompt judicial *review*," *FW/PBS*, 493 U.S. at 228 (emphasis supplied), rather than, as was required in *Freedman* and its progeny, a "prompt judicial *determination*," *Freedman*, 380 U.S. at 60 (emphasis supplied).[10] The plurality's conclusion followed directly from *Southeastern Promotions* and *Freedman*, which concluded that the "prompt judicial determination" requirement rests on essentially the same premise as the procedural safeguard, not applicable to ministerial licensing, requiring censors to institute judicial proceedings to confirm their decisions. *Southeastern Promotions*, 420 U.S. at 560; *Freedman*, 380 U.S. at 58.[11]

[10] Thus, although the *FW/PBS* plurality described this procedural safeguard as "essential," it did not conclude that, in the unique context of ministerial licensing decisions, "prompt judicial review" means the issuance of a judge's decision on a fixed, accelerated timetable. *See also City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 281 (2001) (noting that the opinion announcing the judgment in *FW/PBS* stated that "[u]nsuccessful applicants for an adult business license . . . must be accorded 'an avenue for prompt judicial review.'") (quoting *FW/PBS*, 493 U.S. at 229)).

[11] The short-hand version of *Freedman's* three procedural safeguards for censorship schemes, initially stated in Justice Douglas's *Freedman* concurrence, *id.* at 62, and repeated in *FW/PBS*, 493 U.S. at 227, is not particularly helpful in a case such as this. Justice Douglas, of course, concurred in the decision to strike the Maryland statute, but reiterated his oft-stated position that "I do not believe any form of censorship—no matter how speedy or prolonged it may be—is permissible." *Freedman*, 380 U.S. at 61-62. Thus, the more accurate explanation of *Freedman's* three requirements is not found in Justice Douglas's summary list, but in the explanation of the safeguards provided in the majority opinion. *Id.* at 58-60. Careful review reveals that each safeguard was specifically grounded in the content-based nature of the censor's determination:

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The Littleton Ordinance makes "prompt judicial review" "available" to adult businesses, as required by the *FW/PBS* plurality. Under the fixed time limits set by the Ordinance, the City will complete its review of an application, *both* as an initial matter and on administrative appeal, within 40 days. LCC § 3-14-8(A)&(B) (mandating initial decision within 14 days, providing 10 days to file notice of appeal, requiring hearing within 14 days of notice and mandating decision within 2 days thereafter); *cf. Thomas*, 534 U.S. at 318-319 (noting final administrative decision provided within 42 days). Additionally, although the adult business is given up to 10 days to file a notice of administrative appeal, that essentially *pro forma* notice takes almost no time to prepare and file, enabling the applicant to obtain a final administrative order within as little as 30 or 31 days of filing its application.

That order is immediately appealable pursuant to Colo.R.Civ.P. 106(a)(4). *City of Colorado Springs*, 896 P.2d at 282-284 (noting that district court may grant interim relief, accelerate any action requiring acceleration, entertain constitutional claims, noting that any threat to free

> First, the burden of *proving that the film is unprotected* expression must rest on the censor. . . . Second, . . . the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination *whether a film constitutes protected expression*. . . . Moreover, . . . an administrative refusal to license, signifying the censor's *view that the film is unprotected*, may have a discouraging effect on the exhibitor. *Therefore*, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Id. at 58-59 (citations omitted) (emphasis supplied).

expression "may be remedied promptly by judicial intervention," and concluding that Colo.R.Civ.P. 106(a)(4) satisfies *FW/PBS*'s requirement of prompt judicial review). The Littleton Ordinance therefore provides a quick exit from the administrative process and immediate access to, as discussed below, "effective judicial review." *Thomas*, 534 U.S. at 323.

A. The Rationales of *Freedman's* Prompt Judicial Decision Requirement Are Inapposite to Littleton's Ordinance.

As explained in *Freedman* and *Shuttlesworth* and reiterated in *FW/PBS*, two fundamental concerns justify *Freedman's* stringent procedural safeguards. The first is the judicial expertise necessary to supervise censorship schemes, because "the line between legitimate and illegitimate speech is often so finely drawn," *Southeastern Promotions*, 420 U.S. at 559, and the censor will tend to err on the side of disallowing speech. The second is the risk of self-censorship because the license denial "may have a discouraging effect on the exhibitor," *Freedman*, 380 U.S. at 59, such that the administrative action may be tantamount to suppression of the speech.

The *FW/PBS* plurality addressed both issues squarely. First, the judicial expertise rationale is inapposite because an objective licensing standard involves only "ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229. Thus, the plurality held that in such situations, a city does not bear the burden of going to court, nor the burden of proof once in court. *Cf. Freedman*, 380 U.S. at 58 (requiring the censor to bear the "burden of proving the film is unprotected"). The plurality's conclusion in this regard is directly relevant to the judicial

review requirement, because relieving the government of the burden of proof concerning a ministerial licensing decision demonstrates that this is not a case "[w]here the transcendent value of speech is involved." *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

While an adult business owner will likely have the financial incentive to challenge a regulation, this Court's cases reveal that "the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or a book might convey." *Young*, 427 U.S. at 77 (Powell, J., concurring in the result). This "central concern" is not involved here, where "none of the grounds for denying a permit has anything to do with what a speaker might say." *Thomas*, 534 U.S. at 322. Littleton's licensing standards have nothing to do with the content of speech nor do they prescribe the size, shape, color, texture, flavor, content, or message of any adult products which are sold. Creators and sellers of adult products are free in Littleton to explore the full range of their imagination and creative expression.

Second, the *FW/PBS* plurality explained that content-neutral licensing decisions do not raise the specter of self-censorship. In *Freedman*, it was the discouraging effect of a license denial based on the content of speech that could cause the exhibitor "to be deterred from challenging the decision to suppress the speech, and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech." *FW/PBS*, 493 U.S. at 229. Such a concern is plainly absent in ministerial licensing decisions: "Because the license is the key to the applicant's obtaining and maintaining a business, there is every

incentive for the applicant to pursue a license denial through court." *Id.* at 229-230.

The lack of the self-censorship rationale here is dispositive, because it was the *very reason* the *Freedman* Court imposed the prompt judicial determination requirement:

> [A]n administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan*, *supra*. Therefore, the procedure must also assure a prompt final judicial decision, *to minimize the deterrent effect of an interim and possibly erroneous denial of a license*.

Freedman, 380 U.S. at 59 (emphasis supplied).

Ironically, ZJ's did not engage in self-censorship—rather, it brazenly opened and has continually operated in an improperly zoned area despite rulings from the District Court and the Tenth Circuit.

After discussing the absence of these rationales in objective permitting decisions, the *FW/PBS* plurality dispensed with the requirement—mentioned first and foremost in the *Freedman* opinion, *id.* at 58—that the government bear the burdens of proof and prosecution. *FW/PBS*, 493 U.S. at 230 ("Because of these differences . . . the city does not bear the burden of going to court to effect the denial of a license application"). Rather, the plurality specifically concluded that "[l]imitation on the time within which the licensor must issue the license as well as the *availability* of prompt judicial review satisfy the 'principle that the freedoms of expression must be

ringed about with adequate bulwarks.'" *Id.* (citation omitted) (emphasis supplied).

There is no basis to retreat from the view of the *FW/PBS* plurality and extend the "prompt judicial determination" requirement to encompass appeals from ministerial licensing rulings. A straightforward review of *Freedman* shows that its prompt judicial decision requirement does not apply of its own force to the Littleton Ordinance. Although ZJ's invokes the "prior restraint" doctrine and urges this Court to "mechanically apply the doctrines developed in other contexts," *Young*, 475 U.S. at 76 (Powell, J., concurring), this Court has long recognized, especially in the First Amendment realm, that "broad statements of principle, no matter how correct in the context in which they are made," cannot answer novel questions in significantly different contexts. *Id.* at 65 (plurality opinion of Stevens, J.); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively settled by broad language in cases where the issue was not presented or even envisioned"); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (noting that, even in a censorship case, "the phrase 'prior restraint' is not a self-wielding sword" or a "talismanic test," but that each claim must be analyzed against "the operation and effect of the statute in substance") (quoting *Near v. Minnesota*, 283 U.S. 697, 713 (1931)).

Such observations are especially appropriate here, where unbridled discretion—the *sine qua non* of prior

restraint—is absent from the Littleton Ordinance.[12] Thus, Littleton's Ordinance is more properly analyzed as a time, place, and manner regulation. *Thomas*, 534 U.S. at 316 (identifying procedural requirements for time, place, and manner regulation).

B. ZJ's "Substantial or Significant" Argument is Not an Unbridled Discretion Argument At All, But a Meritless Vagueness Challenge Irrelevant to the Question Presented.

ZJ's has not, and cannot, contend that the Littleton Ordinance permits city officials to deny a license based on the content of any communication. As ZJ's notes[13] and the lower courts confirmed, Littleton's licensing decision "does not involve discretion on the part of the licensing official." (Pet. App. 29 n.13 and 65) (holding that "the Littleton city clerk does not have unbridled discretion to either approve or deny a license").[14]

[12] Well-reasoned opinions of the courts of appeals are in accord. *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 707 (5th Cir. 1994) ("The order, by its own terms, combats pernicious side effects of adult businesses" and "does not censor"); *Graff*, 9 F.3d at 1331 (Flaum, J., concurring) ("Moreover, uncritically extending *Freedman*'s reach to strike down the ordinance for lack of judicial review, by attributing broad significance to language in later cases that dealt with schemes substantially dissimilar from the one at issue here, would embark us on a senseless departure from the core logic undergirding the holdings in *Freedman* and its progeny; for neither the purpose nor effect of the ordinance, unlike the laws challenged in that line of cases, is to involve the licensor in any decision-making of constitutional proportion.")

[13] Resp. Brf. in Opp. Pet. 6.

[14] ZJ's Brief in Opposition to the Petition also does not argue that the Littleton Ordinance suffers from the "undue delay" strand of unbridled discretion which infected the Dallas ordinance at issue in

(Continued on following page)

Faced with this reality, ZJ's fashions a new argument—raised for the first time in this Court—that the City's failure to specifically define the phrase "significant or substantial" in the definition of adult bookstore renders the Littleton Ordinance an unconstitutional prior restraint. ZJ's Brf. in Opp. to Pet. at 6 ("While the *criteria for granting* a license have been held to provide objective standards, the *requirement for a license* itself involves the exercise of broad discretion by Littleton City officials") (emphasis supplied).

As an initial matter, this argument has been waived because it was never presented below. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *NCAA v. Smith*, 525 U.S. 459, 470 (1999) (noting that the Court will consider only questions properly presented in or passed upon by the court below). To be sure, ZJ's mounted

FW/PBS. 493 U.S. at 227 (invoking prior restraint analysis to invalidate the Dallas ordinance because city-conducted inspections, which were prerequisites to licensure, were not mandated within a specific time frame). This is logical, given that the Tenth Circuit severed the provisions requiring the zoning officer's letter of compliance and photographs and fingerprints administered by the police department. (Pet. App. 22, 24). Additionally, these provisions have subsequently been amended to require the zoning official's letter within five days of a request (or the location is deemed compliant) and have eliminated the City's involvement in administering photographs or fingerprints. LCC §§ 3-14-7; 3-14-5(B)(11) (Br. App. 26a-28a). Moreover, the Ordinance specifically provides that: "If any city official or department fails to render a timely decision pursuant to the terms of this ordinance then said official or department shall be deemed to have approved or consented to the issuance of the requested license." LCC § 3-14-8(C) (Br. App. 30a). Thus, since both of the "evils" that are the hallmark of prior restraint analysis—amorphous standards and undue delay—are absent here, this case is distinguishable from not only *FW/PBS*, but also from all of this Court's prior restraint decisions.

challenges to "substantial or significant" below—but those arguments were vagueness and overbreadth challenges that were flatly rejected. (Pet. App. 12 n.4) (rejecting vagueness challenge, finding that the Ordinance is "unquestionably applicable" to ZJ's, and affirming that ZJ's lacked standing under *Young*, 427 U.S. at 60-61, to bring the vagueness challenge) (Pet. App. 51-55) (rejecting vagueness and overbreadth challenges and commenting that ZJ's claim that it was not an adult bookstore was "frivolous at best" and based on "incredulous arguments").

Moreover, the claim that the phrase "substantial or significant" is vague is irrelevant to any cognizable theory of unbridled discretion. This Court has never held that the determination of whether a regulation *applies* to a particular business, or even to a course of expressive conduct, is itself an act of unbridled discretion. Rather, it is "unbridled discretion with respect to the criteria used in deciding *whether or not to grant a license*" that is "deemed to convert an otherwise valid law into an unconstitutional prior restraint." *FW/PBS*, 493 U.S. at 246 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (citations omitted); *Shuttlesworth*, 394 U.S. at 150 (finding unconstitutional prior restraint because "in deciding *whether or not to withhold a permit*, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'") (emphasis supplied).

The Ordinance lacks such discretion. Even if an establishment's inventory consisted solely of obscene material, Littleton must promptly grant a license if the applicant meets the straightforward standards of its Ordinance. LCC § 3-14-8 (mandating that application for a license "shall be approved" unless applicant is disqualified pursuant to one of eight objective standards). Where, as

here, it is admitted that the City lacks discretion to deny licenses to qualified applicants, the impetus for *Freedman's* prompt judicial decision requirement is wholly lacking.[15]

Finally, it bears noting that an adult business has at least two avenues to bring a constitutional challenge, directly in court, without any delay whatsoever, to either the requirement that it obtain a license or, as discussed below, to the substantive time, place, and manner regulations in the ordinance. First, an adult business can bring a declaratory judgment action in state court. *See* § 13-51-105 Colo.Rev.Stat. (2003). Second, just as ZJ's did here, an adult business can bring an action in federal court under 42 U.S.C. § 1983. *See generally Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982) (no administrative exhaustion requirement applies to section 1983 actions). These avenues of judicial review, of course, are in addition to the procedure made available under Colo.R.Civ.P. 106(a)(4) to any applicant denied a license under the Ordinance's specific standards.

C. ZJ's "Content-Based" Argument is Not Only Irrelevant to Prior Restraint Analysis, But Also Directly Contrary to this Court's Adult Business Cases.

ZJ's proffers a second reason for imposing *Freedman's* "prompt judicial determination" requirement on municipal

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[15] Indeed, the absence of any discretion in the licensing decision may divest ZJ's of standing to bring this challenge. "Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

ordinances such as the one at bar: they are allegedly content-based by virtue of being directed at sexually oriented businesses. Resp. Brf. in Opp. to Pet. 3 (claiming that the Ordinance regulates "on the basis of the content"). This argument, however, suffers from the same critical defect as the previous contention—the City's act of defining a category of regulated land uses or businesses does not in any way give the City discretion "in deciding whether or not to withhold a permit." *Shuttlesworth*, 394 U.S. at 150. Thus, ZJ's substantive attack—rejected by the lower courts (Pet. App. 33 n.15 and 57-59)—adds nothing to its procedural contention that *Freedman's* "prompt judicial determination" requirement should apply here.

ZJ's argument to treat the Ordinance as "content-based" fails for another reason: it is directly contrary to every relevant decision of this Court. *Young*, 427 U.S. at 71-72 (plurality); *id.* at 78 (Powell, J., concurring) (holding that adult business ordinance "has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [sexually explicit films]"); *City of Renton*, 475 U.S. at 48 ("In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech'") (citations omitted); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585 (1991) (Souter, J., concurring in judgment) (upholding nudity ban as applied to adult businesses and concluding that "the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression"); *City of Erie*, 529 U.S. at 295 (plurality opinion) (same); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion) (explaining that "*Renton* requires that municipal ordinances receive only intermediate scrutiny" when

directed at secondary effects); *id.* at 445, 448 (Kennedy, J., concurring in the judgment) (noting that content-neutral label is "imprecise," but that "the central holding of *Renton* is sound" because controlling secondary effects is a content-neutral justification).

In short, it is well-settled that adult business ordinances aimed at secondary effects are evaluated under the standard for content-neutral time, place, and manner regulations because they do not control the content of any expression and are "*justified* without reference to the content of the regulated speech." *City of Renton*, 475 U.S. at 48 (alteration in original) (quoting *Virginia State Board of Pharmacy*, 425 U.S. at 771). This is amply demonstrated by the fact that Littleton's substantive time, place, and manner regulations[16] are clearly designed to further

[16] In addition to location requirements, which were challenged and upheld below—Pet. App. 37-38, *id.* at 62-63—the Littleton Ordinance contains, *inter alia*, regulations establishing hours of operation, LCC § 3-14-14, prohibiting physical contact between nude dancers and patrons, LCC § 3-14-15(A)(9) (Br. App. 38a), forbidding completely enclosed "peep booths," LCC § 3-14-15(B) (Br. App. 39a-40a), and establishing minimum lighting requirements, LCC § 3-14-17 (Br. App. 41a). These content-neutral regulations constitute public health and safety requirements similar to the hours, traffic, and safety regulations upheld in *Thomas* and properly subjected to only the normal processes of judicial review. *Thomas*, 534 U.S. at 322-324 (following, *inter alia*, *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395 (1953) (requiring applicant denied permit for expressive activity to seek judicial review)). Moreover, they are precisely the kind of adult business regulations upheld by this Court in *Renton* and *Erie* and by the courts of appeals in numerous decisions. *See, e.g.*, *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003) (hours of operation); *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir. 1996) (open booth requirements); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (buffers between patrons and erotic dancers).

its interest in preventing secondary effects—decreased property values, crime, and urban blight—a government interest which does not turn on the psychological effect speech may have on its listeners. *Boos v. Barry*, 485 U.S. 312, 320-321 (1988) (distinguishing *Renton* from content-based restrictions on speech).

Additionally, the Littleton Ordinance "is not limited to expressive activities," *City of Los Angeles*, 535 U.S. at 447, but rather regulates all sex-oriented enterprises including, for example, "sexual encounter centers" not engaged in protected expression. LCC § 3-14-2 (Br. App. 12a-21a). Thus, the Ordinance "is not even directed to communicative activity as such," *Thomas*, 534 U.S. at 322, but at a category of land uses associated with secondary effects. LCC § 3-14-1 (Br. App. 12a) (noting that ordinance has "neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials," but is aimed at limiting "the adverse secondary effects" of adult businesses); *see also City of Erie*, 529 U.S. at 297 (holding that city could rely on evidentiary foundation in *Young* and *Renton* "that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood").

Finally, ZJ's "content-based" argument runs headlong into this Court's narrow tailoring standard for adult business regulations, which *requires* the Ordinance to affect only adult businesses, "thus avoiding the [overbreadth] flaw that proved fatal to the regulations in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." *City of Renton*, 475 U.S. at 52 (clarification added); *see also FW/PBS*, 493 U.S. at 244 (White, J., concurring in part and dissenting in part) (noting that *Renton* and *Young*

teach that adult business regulations, "although focusing on a limited class of businesses," are to be treated as content-neutral); *Barnes*, 501 U.S. at 585 n.2 (1991) (Souter, J., concurring in judgment) (holding that regulation would be suspect if applied outside the secondary effects context of *Renton*-type adult entertainment).

Relying on this Court's precedents, the text of the Littleton Ordinance, and the legislative and judicial record in this case, the District Court found that the Ordinance is "narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication." (Pet. App. 60). Given this conclusion—which is not challenged here—it cannot be "suggested that the prerequisites for obtaining a license, such as certificates of occupancy and inspections, do not serve the same kind of substantial government interest dealt with in [*Young* and *Renton*] nor that the licensing system fails the test of content neutrality." *FW/PBS*, 493 U.S. at 245 (White, J., concurring in part and dissenting in part) (clarification added).

D. The Littleton Ordinance Contains Narrow, Objective Standards that Guide the Licensing Decision and Render it Subject to Effective Judicial Review.

Under Littleton's Ordinance, an applicant shall be granted a license within 14 days of application unless one of eight specific reasons justifies denial. LCC § 3-14-8(A) (Br. App. 28a-30a). These straightforward reasons go to whether the applicant is underage, has lied on the application, has recently operated an adult business illegally in the state, is a corporation not in good standing, is overdue on monies owed to the city in relation to an adult business,

does not have a sales tax license, or has recently been convicted of certain sex-related or sex-business related crimes. *Cf. Thomas*, 534 U.S. at 319 n.1 (upholding regulation allowing permit denial based upon, *inter alia*, a material misrepresentation in the application, prior damage to Park District property, outstanding debts to the Park District, failure to comply with "licensure requirements . . . concerning the sale . . . of any goods or services," or a finding that the proposed use is "inconsistent with the classifications and uses of the park" or "would present an unreasonable danger to . . . health or safety").

As the Tenth Circuit noted, Littleton's grounds for license denial "do not involve discretion on the part of the licensing official." (Pet. App. 29 n.13); *cf. Thomas*, 534 U.S. at 324 (noting that grounds for denial "are reasonably specific and objective, and do not leave the decision 'to the whim of the administrator'") (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992)).

The City's objective standards for license denial demonstrate that the judicial expertise rationale underlying the *Freedman* prompt judicial decision requirement is simply inapposite. *Thomas*, 534 U.S. at 322 ("*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation . . ."). Littleton's standards do not require fine line-drawing between protected and unprotected speech—a task properly left to the judiciary—but instead involve content-neutral determinations which are within the traditional realm of municipal expertise.

Characterizing Littleton's Ordinance as a time, place, or manner regulation enforced by ministerial licensing

does not mean that the aggrieved adult business applicant is bereft of procedural protections. The applicant is guaranteed an initial decision within 14 days. LLC § 3-14-8(A). Within 10 days after a license denial, an applicant may request an administrative appeal hearing before the city manager which must be conducted within fourteen days of the request, LCC § 3-14-8(B), and at which the adult business is entitled to present witnesses on its behalf. LCC § 3-14-8(B)(1) (Br. App. 29a). If the applicant is deemed ineligible for a license under the objective standards, the city manager shall issue an order, based on findings of fact, within two days after the hearing. LCC § 3-14-8(B)(2) (Br. App. 29a-30a). That order is immediately appealable to the state district court pursuant to Colo.R.Civ.P. 106(a)(4). LCC § 3-14-8(B)(3) (Br. App. 30a). Finally, if a city official fails to render a timely decision at any time in this process, the official "shall be deemed to have approved" the issuance of the requested license. LCC § 3-14-8(C) (Br. App. 30a).

Because the Littleton Ordinance plainly provides the ability to appeal a licensing decision in court as a matter of right, immediately upon the conclusion of administrative proceedings, the question is not whether judicial review should be *available*, but instead whether the courts are so singularly suited to making licensing determinations that the First Amendment compels deviating from a process that provides prompt commencement of "effective judicial review." *Thomas*, 534 U.S. at 323. Here, the City's objective standards and extensive administrative procedures minimize the risk of an erroneous determination that would prejudice an adult business. The objective standards not only obviate the need for strict judicial superintendence, they also support the City's view that

any error in the process would be obvious, and would be "remedied promptly by judicial intervention." *City of Colorado Springs*, 896 P.2d at 284.

Finally, the immediate availability of judicial review also rebuts the unsupported theory, espoused by the Tenth Circuit, that even though a licensing official "may have little or no discretion in reviewing an application," he may "be tempted nevertheless to overstep the bounds of the ordinance." (Pet. App. 31). Such speculation, which need not detain this Court, is clearly contrary to this Court's view that public officials are entitled to "a presumption of honesty and integrity" in the performance of their public duties in the absence of facts to the contrary. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (noting that courts presume public officers have properly discharged their official duties). Such a presumption is all the more warranted here, where there is, in fact, no discretion in reviewing an application. (Pet. App. 29 n.13); *Thomas*, 534 U.S. at 325 ("[A]buse must be dealt with if and when a pattern of unlawful favoritism appears").

II. Accepting ZJ's Argument Would Cause Substantial, Unwarranted Harm to Municipal and Judicial Interests.

A myriad of logical and practical problems infect ZJ's view that the Constitution requires municipalities to guarantee a judge's prompt decision. Unlike the censorship situation in *Freedman*, where the requirement did not impede the public interest or orderly functioning of the judiciary, expanding the *Freedman* line of cases to this inapposite context would eviscerate the ability of local governments to control secondary effects through objective

licensing procedures and would clog the courts with municipal matters.

Initially the City notes that "a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893-894 (6th Cir. 2000). The same is true of state legislatures, which are bound by separation of powers provisions in state constitutions from interfering with the independence of the judiciary in this regard. *See, e.g., Coate v. Omholt*, 662 P.2d 591, 203 Mont. 488 (1983) (holding that legislative imposition of deadlines for judicial decision making violated separation of powers doctrine); *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000) (holding that state legislature may not impose deadlines for deciding habeas corpus motions without violating separation of powers).

Colorado is no different. Article III of the Colorado Constitution establishes three co-equal departments of government and states that no department "shall exercise any power properly belonging to either of the others." In *Interest of J.E.S.*, the Colorado Supreme Court specifically held that "the courts must be independent, unfettered, and free from directives, influence, or interference" from the legislature. 817 P.2d at 511.[17] Thus, by imposing an

[17] Although ignored by the Tenth Circuit in this case, the inability of cities to control judicial dockets has not been lost on all of the lower courts. *Mai Lee Le v. City of Citrus Heights*, 1999 U.S. Dist. Lexis 13477, *23 (E.D. Cal. 1999) (unpublished) ("In sum, *Freedman* and *Baby Tam* [*and Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998)] insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions—*however impractical they may be*—are the law") (emphasis supplied).

impossible requirement, the Tenth Circuit's decision has effectively invalidated dozens of similar ordinances in cities across the State of Colorado. A preliminary review of 50 municipal codes conducted by the Colorado Municipal League reveals that more than 30 cities employ adult business licensing procedures similar to Littleton's. (Pet. App. 136). Requiring a prompt judicial decision also assumes that state judges will forsake their duties of office by refusing to render one when necessary. Judges in the courts of the State of Colorado have the same duty to apply the protections of the United States Constitution as federal judges. "[S]tate courts share with federal courts an equivalent responsibility for the enforcement of federal rights, a responsibility one must expect they will fulfill." *Schlesinger v. Councilman*, 420 U.S. 738, 756 (1975). It must be assumed that a judge hearing a Colo.R.Civ.P. 106 review will recognize an obligation to proceed promptly and exercise the power to grant a stay, to expedite the determination, or provide such other temporary relief as may be appropriate.

Another curious result of imposing a prompt judicial decision requirement in adult business licensing cases would be that it would have the effect of giving the core political speech activities discussed in *Thomas* less constitutional protection than sexually oriented businesses are afforded. Beginning with the decision in *Young*, this Court has determined that "material that is on the borderline between pornography and artistic expression," is of a less vital interest than "the free dissemination of ideas of social and political significance." *Young*, 427 U.S. at 61. As Justice Stevens noted:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every school child can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizens' right to see 'specified sexual activities' exhibited in the theaters of our choice.

Id. at 70; *see also City of Erie*, 529 U.S. at 294.

Political speech requires the most vigilant protection under the Constitution. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187-88 (1999) (first amendment protection for core political speech "is at its zenith"); *see also Meyer v. Grant*, 486 U.S. 414, 419 (1988). On the other hand, as noted above, sexually oriented speech has traditionally enjoyed protection on the periphery of the First Amendment. *Young*, 427 U.S. at 70-71; *cf. FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978). Yet read together, *Thomas* and the decisions of the circuits which require a prompt judicial decision would have the effect of requiring a prompt judicial decision for sexually oriented businesses, but not for core political speech.

Nevertheless, ZJ's expansive view would have the Constitution granting an unqualified adult business a *per se* right to operate until a court says otherwise.[18] This radical expansion of *Freedman* to content-neutral licensing determinations is not only unworkable and unwarranted under this Court's precedents, it would also create impediments and dangers for local governments in their efforts to control secondary effects through objective

[18] In this case, for example, requiring Littleton to provide a temporary license would allow felons recently convicted of sexual crimes or applicants under the age of eighteen to open and operate an adult business until a court ruled upon the City's denial of a license.

licensing procedures. This Court has repeatedly held that cities' substantial, content-neutral interest in preventing secondary effects—like those identified by the City in this case, Pet. App. 60—is "undeniably important." *City of Erie*, 529 U.S. at 296-297 (following *Young*, *Renton*, and *California v. LaRue*, 409 U.S. 109 (1972)); *see also City of Los Angeles*, 535 U.S. at 444 (Kennedy, J., concurring in the judgment) ("Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real").

If *Freedman's* prompt judicial decision requirement is extended to the situation at bar, the expansion of that rule in the lower courts is practically unavoidable. Indeed, lower courts adopting this requirement have implemented "the *policy* underlying this [prompt judicial decision] safeguard" by extending *Freedman* to post-licensing sanctions based on violative conduct. *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (emphasis supplied); *see also Nightclubs, Inc.*, 202 F.3d at 894 (holding that in licensing, "a city may very well have to go beyond merely maintaining the status quo"); *City News and Novelty*, 531 U.S. at 282 (noting that petitioner adult bookstore's actual request was for a stay after the city refused to renew a license based on, *inter alia*, allowing patrons to engage in sexual activity on the premises). Yet neither logic nor precedent requires municipalities to abdicate their police power when implementing objective licensing standards, either initially or upon periodic review.

ZJ's also fails to acknowledge the sea change its theory would work in municipal law and the role of the courts. The requirement of a prompt judicial decision would necessarily undermine a wide range of time, place,

and manner regulations that are enforced through objective permitting procedures. These range from regulations of noncommercial expressive conduct in subways, *see Jews for Jesus*, 984 F.2d at 1327 (construing *FW/PBS* to require only that ordinance permit prompt judicial review), to permitting requirements for newsracks. *Graff*, 9 F.3d at 1324 n.11 (holding that ordinance did not confer unbridled discretion and ruling that a "newsstand is also as much a business as an adult bookstore. Therefore, Chicago need not prove its case in court before ruling on a permit or removing a newsstand").[19] Such a rule would unnecessarily thwart municipal attempts to control not only the secondary effects of adult businesses, but also the attendant consequences of a myriad of unregulated activities associated with expression. It would be unreasonable to hold that regulation to prevent negative secondary effects is a laudable goal, perhaps even a duty for municipalities, while at the same time creating a requirement which cities like Littleton simply cannot meet. The First Amendment does not compel such a result, nor does it require that municipalities grope for solutions which may not work, while allowing the conditions conducive to secondary effects to flourish during judicial review of ministerial licensing decisions.

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[19] Note the similar concerns raised by the Colorado Municipal League in its Amicus Brief filed in support of Littleton's petition for rehearing en banc. (Pet. App. 138-139).

CONCLUSION

For these reasons, Littleton requests that this Court reverse the holding of the United States Court of Appeals for the Tenth Circuit requiring a prompt judicial decision and find that the requirement of prompt judicial review imposed by *FW/PBS* entails a prompt commencement of judicial proceedings.

Respectfully submitted,

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CERTIFICATION

I, Julie K. Bower City Clerk for the City of Littleton, Colorado, do hereby certify that the attached is a true and complete copy of Ordinance No. 17, Series of 2003, as remains on file in the office of the City Clerk.

Dated this 31st day of October, 2003.

[SEAL]

/s/ Julie K. Bower
Julie K. Bower
City Clerk

CITY OF LITTLETON, COLORADO

ORDINANCE NO. 17

Series of 2003

INTRODUCED BY COUNCILMEMBERS: Cronenberger and Ostermiller

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO AMENDING SECTIONS 3-14-5 AND 3-14-7 OF THE LITTLETON CITY CODE PERTAINING TO THE LICENSING OF ADULT BUSINESSES

WHEREAS, the United States Court of Appeals for the Tenth Circuit found that certain provisions of the Adult Entertainment Business Code were unconstitutional in *ZJ Gifts D4 LLC v. City of Littleton,* 311 F. 3d 1220 (10th Cir. 2002); and

WHEREAS, the City Council desires to regulate adult entertainment businesses in a manner which is consistent with the Constitution of the United States.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Section 3-14-5(A) of the Littleton City Code is hereby amended by the addition of the words in all capital letters to read as follows:

(A) All applicants for an adult business license shall file an application for such license with the city clerk on forms to be provided by the clerk. Each principal owner and all managers and employees shall be named in the application form. AT THE TIME OF FILING AN APPLICATION, each manager, general, partner, and in the case of a corporate applicant, the president of the corporation, shall be photographed and fingerprinted by the city's police department. THE POLICE DEPARTMENT SHALL TAKE THE PHOTOGRAPHS AND FINGERPRINTS WITHIN FIVE (5) BUSINESS DAYS OF AN APPLICATION BEING FILED.

Section 2: Section 3-14-5(b)(10) is hereby repealed.

Section 3: Section 3-14-7 is hereby amended by the addition of the words in all capital letters and the deletion of the words stricken to read as follows:

3-14-7: INVESTIGATION:

On receipt of a properly completed application, ~~together with all information required in connection therewith, fingerprints and photographs~~, and the payment of the application and license fees, the city clerk shall transmit the application to the city's police department for an investigation of the background of each individual applicant, employee, the partners of a partnership, or the officers, directors and holders of the stock of a corporation.

Each applicant shall pay a nonrefundable investigation fee at the time the application is filed in the amount then charged by the Colorado department of public safety for each person who will be investigated. The investigation conducted by the police department shall be sufficient to verify the accuracy of all the information required by section 3-14-5 of this chapter. THE CLERK SHALL ALSO TRANSMIT A REQUEST TO THE CITY'S ZONING OFFICIAL FOR A REPORT THAT THE PROPOSED LOCATION OF SUCH ADULT BUSINESS COMPLIES WITH THE LOCATIONAL REQUIREMENTS OF THIS CHAPTER. THE ZONING OFFICIAL SHALL ISSUE SUCH REPORT WITHIN FIVE (5) BUSINESS DAYS OF TRANSMISSION OF THE REQUEST. IF THE ZONING OFFICIAL FAILS TO ISSUE THE REPORT AS REQUIRED, THE CITY CLERK MAY PRESUME THAT THE PROPOSED LOCATION OF THE ADULT BUSINESS COMPLIES WITH THIS CHAPTER.

Section 4: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 5: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 20th day of May, 2003, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of May 22, 2003.

PUBLIC HEARING on the Ordinance to take place on the 3rd day of June, 2003, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton, Colorado; at the hour of 7:00 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading, following public hearing, by a vote of 6 FOR and 0 AGAINST on the 3rd day of June, 2003, and ordered published by reference only in the Littleton Independent on the 5th day of June, 2003.

ATTEST:

/s/ Julie K. Bower
CITY CLERK

/s/ Susan M. Thornton
PRESIDENT OF
CITY COUNCIL

APPROVED AS TO FORM:

/s/ Brad D. Bailey
CITY ATTORNEY

CITY OF LITTLETON, COLORADO

ORDINANCE NO. 37

Series of 2003

INTRODUCED BY COUNCILMEMBERS: Taylor and Meagher

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO AMENDING SECTIONS 3-14-7 AND 3-14-8 OF THE LITTLETON CITY CODE PERTAINING TO THE LICENSING OF ADULT BUSINESSES

WHEREAS, a periodic review of the City's Adult Business Licensing provisions has revealed that clarifications are appropriate to avoid any assertion or perception of inconsistencies in the Ordinance; and

WHEREAS, a periodic review of the City's Adult Business Licensing provisions has revealed that the licensing process can be revised to allow for more prompt administrative decisions in licensing adult businesses; and

WHEREAS, the City Council intends, as it has done, to periodically review the City's Adult Business Licensing provisions to make sure that they remain consistent and in accordance with court decisions.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: The definition of specified criminal acts as contained in Section 3-14-2 of the Littleton City Code is hereby amended to read:

SPECIFIED CRIMINAL ACTS:

Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, or pandering.

Section 2: Section 3-14-5(A) of the Littleton City Code is hereby amended to read:

(A) All applicants for an adult business license shall file an application for such license with the City Clerk on forms to be provided by the Clerk. Each principal owner and all managers and employees shall be named in the application form.

Section 3: Section 3-14-5(B) of the Littleton City Code is hereby amended by the addition of a new Section 11:

11. Photographs [passport size or approximately two inches (2") by two inches (2")] and fingerprints of all principal owners and each manager, general partner and in the case of a corporate applicant, the president of the corporation.

Section 4: Subsection 3-14-5(B)(1)(a) of the Littleton City is hereby amended to read:

An individual, the individual shall state his or her legal name and any aliases and shall submit satisfactory proof that he or she is eighteen (18) years of age;

Section 5: Subsection 3-14-5(B)(7) of the Littleton City Code is hereby amended to read:

7. A photocopy of the driver's license or other government-issued identification card for the individuals listed in subsection (A) of this Section.

Section 6: Subsection 3-14-5(D) of the Littleton City Code is hereby amended to read:

D. If an omission or error is discovered by the City Clerk the application will be returned to the applicant for completion or correction without further action by the City Clerk. Any application rejected to an omission or error shall be refiled only when the omission or error has been remedied. For the purposes of this chapter, the date the City Clerk accepts an application which is complete shall be the date the application is filed with the City Clerk.

Section 7: Section 3-14-7 of the Littleton City Code is hereby amended to read:

3-14-7: INVESTIGATION:

On receipt of a properly completed application and the payment of the application and license fees, the City Clerk shall investigate the background of each individual applicant, employee, the partners of a partnership, or the officers, directors and holders of the stock of a corporation. Each applicant shall pay a nonrefundable investigation fee at the time the application is filed in the amount then charged by the Colorado department of public safety for each person who will be investigated. The investigation conducted by the Clerk shall be sufficient to verify the accuracy of all the information required by section 3-14-5 of this chapter. The Clerk shall also transmit a request to the city's zoning official for a report that the proposed location of such adult business complies with the locational requirements of this chapter. The zoning official shall issue such report within five (5) business days of transmission of the request. If the zoning official fails to issue the report as required, the City Clerk shall presume that the proposed location of the adult business complies with this chapter.

Section 8: Section 3-14-8 of the Littleton City Code is hereby amended to read:

3-14-8: **APPROVAL/DENIAL OF LICENSE:**

(A) The application of any applicant shall be approved or denied by the City Clerk within fourteen (14) days of the date the application is filed with the City Clerk. The City Clerk shall deny a license if:

1. The applicant is under the age of eighteen (18) years;

2. The applicant has made a false statement upon the application or has given false information in connection with an application;

3. The applicant or any holder of any class of stock, or a director, officer, partner or principal of the applicant has had an adult business license revoked or suspended anywhere within the state within one year prior to the application;

4. The applicant has operated an adult business which has determined to be a public nuisance under state law or this code within one year prior to the application;

5. A corporate applicant is not in good standing or authorized to do business in the state; or

6. The applicant is overdue in the payment to the City of taxes, fees, fines or penalties assessed against him/her or imposed against him/her in relation to an adult business;

7. The applicant has not obtained the required sales tax license;

8. The applicant has been convicted of a specified criminal act within the five year period prior to the date the application is filed with the City Clerk.

(B) In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by first class mail to the address shown in the application. An applicant shall have the right to a hearing before the City Manager as set forth in subsection 3-14-11(C) of this chapter. A written request for such hearing shall be made to the City Manager within ten (10) days of the date of the denial of the license by the City Clerk. This hearing shall be held within fourteen (14) days from the date a timely request for hearing is received by the City Manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection 3-14-11(C) of this chapter.

1. At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the police department or other enforcement officers, the applicant or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the City Clerk.

2. If the City Manager determines that the applicant is ineligible for a license per subsection (A) of this section, he/she shall issue an order sustaining the City Clerk's denial of the application, within two (2) days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to the applicant at the address supplied on the application.

3. The order of the City Manager made pursuant to subsection (B)2 of this section shall be a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4).

Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

(C) If any city official or department fails to render a timely decision pursuant to the terms of this ordinance then said official or department shall be deemed to have approved or consented to the issuance of the requested license.

Section 9: Section 3-14-11(A)(8) of the Littleton City Code is hereby amended to read:

8. The manager or the employee of the licensed establishment is under the age of eighteen (18) years;

Section 10: Section 3-14-16 of the Littleton City Code is hereby amended to read:

Admission to adult businesses is restricted to persons of the age of eighteen (18) years or more.

Section 11: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 12: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 4th day of November, 2003, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of November 6, 2003.

PUBLIC HEARING on the Ordinance to take place on the 18th day of November, 2003, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton, Colorado, at the hour of 7:00 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading as amended, following public hearing, by a vote of 7 FOR and 0 AGAINST on the 18th day of November, 2003, and ordered published in full in the Littleton Independent on the 20th day of November, 2003.

ATTEST:

/s/ Nancy K. Worthington
Deputy CITY CLERK

/s/ John K. Ostermiller
PRESIDENT OF
CITY COUNCIL

APPROVED AS TO FORM:

/s/ Larry W. Berkowitz
CITY ATTORNEY

CHAPTER 14

ADULT ENTERTAINMENT ESTABLISHMENTS

3-14-1: PURPOSE:

1. The purpose and intent of this Chapter is to regulate adult businesses, to promote the health, safety, morals and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of adult businesses within the City, thereby reducing or eliminating the adverse secondary effects from such adult businesses. The provisions of this Chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including adult materials. Similarly, it is not the intent nor effect of this Chapter to restrict or deny access by adults to adult materials protected by the First Amendment or the Colorado constitution, or to deny access by the distributors and exhibitors of adult entertainment to their intended market. Neither is it the intent nor effect of this Chapter to condone or legitimize the distribution of obscene material.

3-14-2: DEFINITIONS:

ADULT ARCADE: An establishment where, for any form of consideration, one or more still or motion picture projectors, slide projectors or similar machines, or other image producing machines, for viewing by five (5) or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or

description of "specified sexual activities" or "specified anatomical areas".

ADULT BOOKSTORE, ADULT NOVELTY STORE OR ADULT VIDEO STORE:

A commercial establishment which a) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; b) receives a significant or substantial portion of its revenues from; or c) devotes a significant or substantial portion of its advertising expenditures to the promotion of: the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas". An establishment may have other principal business purposes that do not involve the offering for sale, rental or viewing of materials depicting or describing "specified sexual activities" or "specified anatomical areas", and still be categorized as an adult bookstore, adult novelty store or adult video store. Such other business purposes will not serve to exempt such establishment from being categorized as an adult bookstore, adult novelty

store or adult video store so long as the provisions hereof are otherwise met.

ADULT BUSINESS: An adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment or nude model studio. The definition of "adult businesses" shall not include an establishment where a medical practitioner, psychologist, psychiatrist or similar professional person licensed by the State engages in medically approved and recognized sexual therapy.

ADULT CABARET: A club, restaurant, "pop shop", or similar commercial establishment which features: a) persons who appear nude or in a state of nudity or semi-nude; b) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities", or c) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

ADULT MOTEL: A motel, hotel or similar commercial establishment which: a) offers public accommodations for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion

pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas" and which advertises the availability of this adult type of material by means of a sign visible from the public right of way, or by means of any off-premises advertising, including but not limited to newspapers, magazines, pamphlets or leaflets, radio or television, or b) offers a sleeping room for rent for a period of time less than ten (10) hours; or c) allows a tenant or occupant to subrent a sleeping room for a time period of less than ten (10) hours.

ADULT MOTION PICTURE THEATER: A commercial establishment where films, motion pictures, video cassettes, slides or similar photographic reproductions depicting or describing "specified sexual activities" or "specified anatomical areas" are regularly shown for any form of consideration.

ADULT THEATER: A theater, concert hall, auditorium or similar commercial establishment which, for any form or consideration, regularly features persons who appear in a state of nudity or live performances which are characterized by exposure of "specified

anatomical areas" or by "specified sexual activities".

EMPLOYEE: A person who works or performs in and/or for an adult business, regardless of whether or not said person is paid a salary, wage or other compensation by the operator of said business.

ESTABLISHMENT: In regard to an adult business, means and includes any of the following:

(A) The opening or commencement of any such business as a new business;

(B) The conversion of an existing business into an adult business;

(C) The addition of an adult business to any other existing adult business; or

(D) The relocation of an adult business.

LICENSING OFFICER: The City Clerk.

MANAGER: An operator, other than a licensee, who is employed by an adult business to act as a manager or supervisor of employees or is otherwise responsible for the operation of the business.

NUDE MODEL STUDIO:

Any place where a person, who appears in a state of nudity or displays "specified anatomical areas", is provided for money or any form of consideration to be observed, sketched, drawn, painted, sculpted, photographed or similarly depicted by other persons.

NUDITY OR STATE OF NUDITY:

(A) The appearance of human bare buttocks, anus, male genitals, female genitals or the areola or nipple of the female breast;

(B) A, state of dress which fails to opaquely and fully cover a human buttocks, anus, male or female genitals, pubic region or areola or nipple of the female breast.

OPERATOR: Includes the owner, permit holder, custodian, manager, operator or person in charge of any permitted or licensed premises.

PEEP BOOTH: A viewing room of less than one hundred fifty (150) square feet of floor space.

PERMITTEE AND/OR LICENSEE:

A person in whose name a permit and/or license to operate an adult business has been issued, as well as the individual listed as an applicant on the application for a permit and/or license.

PERSON: An individual, proprietorship, partnership, corporation, limited liability company, association or other legal entity.

PREMISES OR PERMITTED OR LICENSED PREMISES:

Any premises that requires a license and/or permit and that is classified as an adult business.

PRINCIPAL OWNER: Any person owning, directly or beneficially, a) ten percent (10%) or more of a corporation's equity securities; b) ten percent (10%) or more of the membership interests in a limited liability company; or c) in the case of any other legal entity, ten percent (10%) or more of the ownership interests in the entity.

PRIVATE ROOM: A room in an adult motel that is not a peep booth, has a bed and a bath in the room or adjacent room, and is used primarily for lodging.

SEMINUDE: A state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

SEXUAL ENCOUNTER ESTABLISHMENT:

A business or commercial establishment, that as one of its primary business purposes, offers, for

any form of consideration, a place where two (2) or more persons may congregate, associate, or consort for the purpose of "specified sexual activities" or the exposure of "specified anatomical areas" or activities when one or more of the persons is in a state of nudity or seminude. An adult motel will not be classified as a sexual encounter establishment by virtue of the fact that it offers private rooms for rent.

SPECIFIED ANATOMICAL AREAS:

(A) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or

(B) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

SPECIFIED CRIMINAL ACTS:

Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, or pandering.

SPECIFIED SEXUAL ACTIVITIES:

(A) The fondling or other intentional touching of human genitals,

pubic region, buttocks, anus or female breasts;

(B) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation or sodomy;

(C) Masturbation, actual or simulated; or

(D) Human genitals in a state of sexual stimulation, arousal or tumescence;

(E) Excretory functions as part of or in connection with any of the activities set forth in subsections (A) through (D) of this definition.

TRANSFER OF OWNERSHIP OR CONTROL OF AN ADULT BUSINESS: Means and includes any of the following:

(A) The sale, lease or sublease of the business;

(B) The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange or similar means;

(C) The establishment of a trust, management arrangement, gift or other similar legal devise which transfers ownership or control of the business, except for transfer by bequest or other operation of law upon the death of a person possessing the ownership or control.

3-14-3: LOCATION OF ADULT BUSINESSES; AMORTIZATION:

(A) shall be unlawful to operate or cause to be operated an adult business in any location in the city except as provided in this code.

(B) It shall be unlawful to operate or cause to be operated an adult business within five hundred feet (500') of:

1. A church;

2. A school or childcare facility;

3. A public park (not including trails);

4. A massage parlor licensed under provisions of the city code; or

5. A community correctional facility.

(C) It shall be unlawful to cause or permit the operation of an adult business within one thousand feet (1,000') of another adult business or a massage parlor as defined by section 12-48.5-103 Colorado Revised Statutes. The distance between any such businesses and those businesses specified in subsection (B) of this section shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which the adult business is located.

(D) It shall be unlawful to cause or permit the operation or maintenance of more than one adult business in the same building, structure or portion thereof.

(E) Any adult business lawfully operating on the effective date of this chapter that is in violation of subsections (B) through (D) of this section will be permitted to continue for a period six (6) months from the effective

date hereof. However, the zoning administrator may grant an extension of time during which an adult business in violation of subsections (B) through (D) of this section will be permitted to continue upon a showing that the owner of the business has not had a reasonable time to recover the initial financial investment in the business. No such extension of time shall be for a period greater than that reasonably necessary for the owner of the business to recover his/her initial financial investment in the business. An adult business in violation of subsections (B) through (D) of this section may continue during such extended period, unless the business is sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such business shall not be enlarged, extended or altered except that the business may be brought into compliance with this chapter. If two (2) or more adult businesses are within one thousand feet (1,000') of one another and otherwise in a permissible location, the adult business which was first established and continually operating at the particular location will be deemed to be in compliance with subsections (B) through (D) of this section, and the later established business(es) will be deemed to be in violation of subsections (B) through (D) of this section.

(F) An, adult business lawfully operating is not rendered a nonconforming use by the subsequent location of a church, school, childcare facility, public park, residential district, or a residential lot within five hundred feet (500') of the adult business; however, if the adult business ceases operation for a period of one hundred eighty (180) days or more regardless of any intent to resume operation, it may not recommence operation in that location.

3-14-4: LICENSE REQUIRED; FEE:

(A) No person shall conduct an adult business without first having obtained an annual adult business license.

(B) Applicants for an annual adult business license shall pay a license fee of five hundred dollars ($500.00).

(C) In the event an application for an adult business license is withdrawn or denied, the license fee shall not be refunded to the applicant.

3-14-5: LICENSE APPLICATION:

(A) All applicants for an adult business license shall file an application for such license with the city clerk on forms to be provided by the clerk. Each principal owner and all managers and employees shall be named in the application form.

(B) The completed application shall contain the following information and shall be accompanied by the following documents:

1. If the applicant is:

(a) An individual, the individual shall state his/her legal name and any aliases and submit satisfactory proof that he or she is eighteen (18) years of age;

(b) A partnership, the partnership shall state its complete name, and the names of all partners, whether the partnership is general or limited, and a copy of the partnership agreement, if any;

(c) A corporation, the corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing under

the statutes of the state, or in the case of a foreign corporation, evidence that it is currently authorized to do business in the state, the names and capacity of all officers, directors and principal owners, and the name of the registered corporate agent and the address of the registered office for service of process;

(d) A limited liability company shall state its complete name, the date of filing of the articles of organization and operating agreement, the names of all managers and members.

2. Whether the applicant or any other individual listed under subsection (A) of this section had worked under or has had a previous adult business license under this chapter or other adult business or adult entertainment ordinance from another state, city or county denied, suspended or revoked, including the name and location of the adult business for which the permit was denied, suspended or revoked, as well as the date of the denial, suspension or revocation.

3. Whether the applicant or any other individual listed under subsection (A) of this section holds any other licenses under this chapter or other similar adult business ordinance from another city, county or state and, if so, the names and locations of such other permitted business.

4. The location of the proposed adult business, including a legal description of the property, street address and telephone number(s), if any.

5. Proof of the applicant's right to possession of the premises wherein the adult business is proposed to be conducted.

6. The applicant's, or any other individual's listed, pursuant to subsection (A) of this section, mailing address and residential address.

7. A photocopy of the driver's license or other government-issued identification card of the individuals listed in subsection (A) of this section.

8. A floor plan of the proposed licensed premises which specifies the location and dimensions of any manager's station and demonstrates that there is an unobstructed view from at least one of the manager's stations of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. The proposed floor plan shall designate those rooms or other areas of the premises where patrons are not permitted and shall also designate the use of each room or other area of the premises. The proposed floor plan need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches (6"). The diagram shall designate the place where the license will be conspicuously posted and the location of any proposed stage. A floor plan is not required of the licensed premises of an adult motion picture theater.

9. A current certificate drawing prepared, within thirty (30) days prior to the application, by a land surveyor depicting the property lines and the structures containing any adult business or massage parlor within one thousand feet (1,000') of the closest exterior wall of the structure in which the applicant's business is proposed to be located and depicting the property line of any church, school, childcare facility, public park, residential zone district or residential lot within five hundred feet (500') from the closest exterior wall of the structure in which the applicant's business is proposed to be located.

10. Whether the applicant or any of the other individuals listed pursuant to subsection (A) of this section have been convicted of a specified criminal act within the times set forth in section *3-14-8* of this chapter and, if so, the specified criminal act involved, the date of conviction and the place of conviction.

11. Photographs [passport size or two inches (2") by two inches (2")] and fingerprints of all principal owners and each manager, general partner and in the case of a corporate applicant, the president of the corporation.

(C) If the applicant is an individual, he/she must sign the application for a license. If the applicant is a corporation it must be signed by the president or vice president and attested to by the secretary or assistant secretary. If the applicant is a general or limited partnership it must be signed by a general partner. If the applicant is a limited liability company it must be signed by the manager.

(D) If an omission or error is discovered by the city clerk, the application will be returned to the applicant for completion or correction without further action by the city clerk. Any application rejected due to an omission or error shall be refiled only when the omission or error has been remedied. For the purposes of this chapter, the date the city clerk accepts an application which is complete shall be the date the application is filed with the city clerk.

(E) In the event that the city clerk determines that the applicant has improperly completed the application, he/she shall promptly notify the applicant of such fact and allow the applicant thirty (30) days to properly complete the application. The time period for granting or denying a license shall be stayed during

the period in which the applicant is allowed an opportunity to properly complete the application.

(F) Applicants for a license under this chapter shall have a continuing duty to promptly supplement application information required by this section in the event that said information changes in any way from what is stated on the application. The failure to comply with said continuing duty within thirty (30) days from the date of such change, by supplementing the application on file with the city clerk, shall be grounds for the suspension or revocation of an adult business license.

3-14-6: APPLICATION FEE:

1. Each applicant for a new license or as specified in subsection *3-14-12(B)* of this chapter, whether an individual, partnership or corporation, shall pay an application fee of one hundred fifty dollars ($150.00) at the time of the filing of an application. Such application fee shall be nonrefundable.

3-14-7: INVESTIGATION:

1. On receipt of a properly completed application and the payment of the application and license fees, the city clerk shall investigate the background of each individual applicant, employee, the partners of a partnership, or the officers, directors and holders of the stock of a corporation. Each applicant shall pay a nonrefundable investigation fee at the time the application is filed in the amount then charged by the Colorado department of public safety for each person who will be investigated. The investigation conducted by the clerk shall be sufficient to verify the accuracy of all the information required by section *3-14-5* of this chapter. The clerk shall also transmit a request to

the city's zoning official for a report that the proposed location of such adult business complies with the locational requirements of this chapter. The zoning official shall issue such report within five (5) business days of transmission of the request. If the zoning official fails to issue the report as required, the city clerk shall presume that the proposed location of the adult business complies with this chapter.

3-14-8: APPROVAL/DENIAL OF LICENSE:

(A) The application of any applicant shall be approved or denied by the city clerk within fourteen (14) days of the date the application is filed with the city clerk. The city clerk shall deny a license if:

1. The applicant is under the age of eighteen (18) years;

2. The applicant has made a false statement upon the application or has given false information in connection with an application;

3. The applicant or any holder of any class of stock, or a director, officer, partner or principal of the applicant has had an adult business license revoked or suspended anywhere within the state within one year prior to the application;

4. The applicant has operated an adult business which has determined to be a public nuisance under state law or this code within one year prior to the application;

5. A corporate applicant is not in good standing or authorized to do business in the state; or

6. The applicant is overdue in the payment to the city of taxes, fees, fines or penalties assessed against

him/her or imposed against him/her in relation to an adult business;

7. The applicant has not obtained the required sales tax license;

8. The applicant has been convicted of a specified criminal act within the five year period prior to the date the application is filed with the City Clerk.

(B) In the event that the city clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by first class mail to the address shown in the application. An applicant shall have the right to a hearing before the city manager as set forth in subsection *3-14-11(C)* of this chapter. A written request for such hearing shall be made to the city manager within ten (10) days of the date of the denial of the license by the city clerk. This hearing shall be held within fourteen (14) days from the date a timely request for hearing is received by the city manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection *3-14-11(C)* of this chapter.

1. At the hearing referred to above, the city manager shall hear such statements and consider such evidence as the police department or other enforcement officers, the applicant or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the city clerk. In such cases where specified criminal acts are in issue, the provisions of Colorado Revised Statutes section 24-5-101 shall control.

2. If the city manager determines that the applicant is ineligible for a license per subsection (A) of this

section, he/she shall issue an order sustaining the city clerk's denial of the application, within two (2) days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to or be served on the applicant at the address on the application.

3. The order of the city manager made pursuant to subsection (B)2 of this section shall be a final decision and may be appealed to the district court pursuant to Colorado rules of civil procedure 106(a)(4). Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

(C) If any city official or department fails to render a timely decision pursuant to the terms of this ordinance then said official or department shall be deemed to have approved or consented to the issuance of the requested license.

3-14-9: TERM OF LICENSE:

1. All licenses granted pursuant to this chapter shall be for a term of one year. Said term shall commence on January 1 of each year and terminate upon December 31 of the same year. Applications for a license filed at any other time during the year shall be treated the same as if they were filed January 1 of that year and shall terminate on December 31 of that same year, and no proration shall be permitted.

3-14-10: LICENSE RENEWAL:

1. Renewal of an existing license granted pursuant to this chapter may be had by payment of the annual licensing fee and filing of a renewal application with the city clerk not less than forty five (45) days prior to the date of

expiration. The city clerk may waive, for good cause shown, this filing time requirement.

3-14-11: SUSPENSION OR REVOCATION OF LICENSE:

(A) The City Manager may suspend a license for a period not to exceed six (6) months or revoke any license granted pursuant to this Chapter upon a finding of any of the following facts:

1. That repeated disturbances of the public peace have occurred within the licensed establishment or upon any parking areas, sidewalks, accessways or grounds within the neighborhood of the licensed establishment involving patrons, employees or the licensee;

2. That the licensee or any employees thereof have offered for sale or knowingly allowed to be consumed or possessed upon the licensed premises, or upon any parking areas, sidewalks, walkways, accessways or grounds immediately adjacent to the licensed premises, narcotics, dangerous drugs or fermented malt, malt, vinous or spirituous beverages;

3. That the licensee or manager is not upon the licensed premises at all times that adult entertainment is being provided;

4. That adult entertainment was offered at the licensed establishment during hours prohibited by Section *3-14-14* of this Chapter;

5. That the licensee, manager or employee has allowed or has done nothing to prevent patrons from engaging in public displays of indecency in violation of State law or Sections *6-4-7* or *6-4-25* of this Code or has allowed patrons or employees to engage in acts of prostitution or negotiations for acts of prostitution

within the licensed establishment or upon any parking areas, sidewalks, access ways or grounds immediately adjacent to the licensed establishment, when the licensee, manager or employee knew or should have known such displays or acts were taking place;

6. That the licensee or manager made a false statement or gave false information in connection with an application for a license or a renewal of a license;

7. That the licensee, manager, or employee violated or permitted a violation of any provisions of this Chapter including the standards of conduct set forth in Section *3-14-15* of this Chapter;

8. That a manager or employee of the licensed establishment is under the age of eighteen (18) years;

9. That the licensee, in the case of a corporation, is not in good standing or authorized to do business in the State;

10. That the licensee or an employee knowingly operated any aspect or facilities of the adult business during a period of time when the adult business license was suspended;

11. That the licensee is delinquent in the payment to the City or State for any taxes or fees past due;

12. That the licensee, manager or employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation or masturbation, to occur within the licensed premises; or

13. That the licensee, manager or employee has been convicted of a specified criminal act.

(B) Nothing in this Chapter shall prohibit the City from taking any other enforcement action provided for by

this Code, the laws of the State, or of the United States.

(C) A licensee shall be entitled to a hearing before the City Manager if the City seeks to suspend or revoke his/her license based on a violation of this Chapter;

1. When there is probable cause to believe that a licensee has violated or permitted a violation of this Chapter to occur in or near the licensed establishment, the Police Department may file a written complaint with City Manager setting forth the circumstances of the violation.

2. City Manager shall provide a copy of the complaint to the licensee, together with notice to appear before the City Manager for the purpose of a hearing on a specified date to show cause why the licensee's license should not be suspended or revoked.

3. In such cases where specified criminal acts are in issue, the provisions of Colorado Revised Statutes section 24-5-101 shall control.

4. At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department, or other enforcement officers, the owner, occupant, lessee or other party in interest, or any other witness shall offer which is relevant to the violation alleged in the complaint. The City Manager shall make findings of fact from the statements and evidence offered as to whether the violation occurred in or near the licensed establishment. If the City Manager determines that a violation did occur he/she shall issue an order suspending or revoking the license, within twenty (20) days after the hearing is concluded, based on the findings of fact. A copy of the order shall be mailed to or served on the licensee at the address on the license.

5. The order of the City Manager made pursuant to subsection (C)3 of this Section shall be a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4). Failure of a licensee to timely appeal said order constitutes a waiver by him/her of any right he/she may otherwise have to contest the suspension or revocation of his/her license.

6. The City Manager shall have the power to administer oaths, issue subpoenas and, when necessary, grant continuances. Subpoenas may be issued to require the presence of persons and production of papers, books and records necessary to the determination of any hearing which the City Manager conducts. It is unlawful for any person to fail to comply with any subpoena issued by the City Manager. A subpoena shall be served in the same manner as a subpoena issued by the District Court of the State. Upon failure of any witness to comply with such subpoena, the City Attorney shall:

(a) Petition any Judge of the Municipal Court of the City, setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, that the Court, after hearing evidence in support of or contrary to the petition, enter its order compelling the witness to attend and testify or produce books, records or other evidence, under penalty of punishment for contempt in case of wilful failure to comply with such order of Court; or

(b) Petition the appropriate District Court setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, that the Court, after hearing evidence in support of or contrary to the petition, enter its order as in other civil actions, compelling the witness

to attend and testify or produce books, records or other evidence, under penalty of punishment for contempt in case of wilful failure to comply with such order of Court.

(D) In the event of suspension, revocation, or cessation of business, no portion of the license fee, application fee or investigative fee shall be refunded.

(E) When the City Manager revokes a license, the revocation shall continue for one year, and the licensee shall not be issued an adult business license for one year from the date the revocation became effective.

3-14-12: DISPLAY; TRANSFERABILITY; CHANGE OF OWNERSHIP:

(A) Any adult business license issued pursuant to the terms of this Chapter shall be prominently displayed at all times upon the premises for which the license was issued in accordance with subsection 3-14-5(B)8 of this Chapter.

(B) Licenses issued under this Chapter shall not be transferable except as provided herein. Any transfer of ownership or control by a licensee holding an adult business license shall result in termination of the license unless such licensee within thirty (30) days prior to any such transfer files a written notice of such transfer accompanied by the application fee and an investigation fee as required by Sections *3-14-6* and *3-14-7* of this Chapter. Any such transfer shall be reported on forms provided by the City Clerk and shall require the names of all new principal owners and any information as required by Section *3-14-5* of this Chapter. Approval or denial by the City Clerk of such transfer shall be upon the same terms as provided for in this Chapter for the approval or denial of an adult business license.

(C) When a license has been issued to a husband and wife or to general or limited partners, the death of a spouse or partner shall not require the surviving spouse or partner to obtain a new license. All rights and privileges granted under the original license shall continue in full force and effect as to such survivors for the balance of the license.

(D) Each license issued under this Chapter is separate and distinct, and no person shall exercise any of the privileges granted under any license other than that which he holds. A separate license shall be issued for each specific adult business and each geographical location.

3-14-13: MANAGER; CHANGE OF MANAGER:

(A) A registered manager shall be on the premises of an adult business at all times that adult entertainment is being provided. It shall be unlawful for any person to work as a manager of an adult business without first registering with the City Clerk. The registration form shall require the applicant to provide his/her legal name and any aliases, home address, telephone number and satisfactory proof that he is twenty one (21) years of age.

(B) In the event a licensee changes the manager or any employees of an adult business, the licensee shall report such change and register the new manager or any employees on forms provided by the City Clerk within ten (10) days of such change. Any new employee or manager shall pay the investigation fee specified in Section *3-14-7* of this Chapter and shall be subject to approval or denial in accordance with the provisions of Section *3-14-8* of this Chapter.

3-14-14: HOURS OF OPERATION:

It shall be unlawful for a sexually oriented business to be open for business or for the licensee or any employee of a licensee to allow patrons upon the licensed premises from twelve o'clock (12:00) midnight until eight o'clock (8:00) A.M.

3-14-15: STANDARDS OF CONDUCT:

(A) The following standards of conduct must be adhered to by employees of any adult business which offers, conducts or maintains live adult entertainment:

1. Clothing: No employee or entertainer mingling with the patrons or serving food or beverages shall be unclothed or in such attire, costume or clothing so as to expose to view any specified anatomical area.

2. Touching, Caressing, Fondling: No employee or entertainer shall encourage or knowingly permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

3. Simulation Of Specified Areas: No employee or entertainer shall wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

4. Performance Standards:

(a) No employee or entertainer shall be unclothed or in such attire, costume or clothing so as to expose any portion of the specified anatomical area except upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest patron or behind a solid, uninterrupted physical barrier which completely separates the entertainer from any

patrons. This barrier must be a minimum of one-fourth inch (¼") thick and have no openings between the entertainer and any patrons. The stage shall be fixed and immovable.

(b) No employee or entertainer shall perform while nude or seminude any obscene acts or obscene acts which simulate specified sexual activities.

5. Use Of Inanimate Objects: No employee or entertainer shall use artificial devices or inanimate objects to depict any of the prohibited activities described in this Section.

6. Menu: There shall be posted and conspicuously displayed in every area offering adult entertainment a list of food and beverage prices.

7. Alcohol And Liquor: No adult entertainment use shall be located within any premises which is licensed for the retail sale of three and two-tenths percent (3.2%) beer, malt, vinous or spirituous liquor, as such terms are defined in title 12, articles 46 and 47 Colorado Revised Statutes.

8. Consumption Of Alcohol: It shall be unlawful to permit the consumption of three and two-tenths percent (3.2%) beer or other alcoholic beverages within the same premises as an adult entertainment use.

9. Tips: Any tips for entertainers shall be placed by a patron into a tip box which is permanently affixed in the adult business and no tip may be handed directly to an entertainer. A licensee that desires to provide for such tips from its patrons shall establish one or more containers to receive tips. Any physical contact between a patron and an entertainer is strictly prohibited.

10. Tip Boxes: An adult business that provides tip boxes shall conspicuously display in the common area of the premises one or more signs in letters at least one inch (1") high to read as follows:

ADULT ENTERTAINMENT IS REGULATED BY THE CITY OF LITTLETON

Any tips are to be placed in tip box and not handed directly to the entertainer. Any physical contact between the patron and the entertainer is prohibited by law. Violators face maximum penalties of $1,000 and/or one year in jail.

11. Outside Visibility: No adult entertainment occurring on the premises shall be visible at any time from outside of the premises.

(B) Any licensee who offers, conducts, or maintains live adult entertainment or an adult arcade which exhibits in a peep booth, a film, videocassette or other video reproduction, shall comply with the following requirements in addition to those set forth in subsection (A) of this section:

1. It is the duty of the licensee of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

2. It is the duty of the licensee and manager of the premises to ensure that any doors to public areas on the premises remain unlocked during business hours.

3. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. Restrooms may not contain video reproduction equipment or other forms of adult entertainment. If the premises has two (2) or

more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose, excluding restrooms, from at least one of the manager's, stations. The view required in this subsection must be by direct line of sight from the manager's station. A manager's station may not exceed thirty two (32) square feet of floor area.

4. No alteration to the configuration or location of an adult business may be made without the prior written approval of the zoning official.

5. It shall be the duty of the licensee, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in subsection (B)3 of this section remains unobstructed by any doors, curtains, drapes, walls, merchandise, display racks or other materials at all times and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the license application filed pursuant to this chapter.

6. No peep booth may be occupied by more than one person at any one time.

7. Peep booths must be separated from other peep booths by a solid, uninterrupted physical divider which is a minimum of one-fourth inch (1/4") thick and serves to prevent physical contact between patrons.

3-14-16: AGE RESTRICTIONS:

Admission to adult businesses, is restricted to persons of the age of eighteen (18) years or more.

3-14-17: LIGHTING REQUIREMENTS:

(A) All off-street parking areas and premises entries of adult businesses shall be illuminated from dusk to closing hours of operation with a lighting system which provides an average maintained horizontal illumination of one foot-candle of light on all parking surfaces and/or walkways. This required lighting level is to help ensure the personal safety of patrons and employees and to reduce the incidence of vandalism and other criminal conduct.

(B) The premises of all adult businesses, except adult motion picture theaters, shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to provide an illumination of not less than two (2) foot-candles of light as measured at the floor level.

(C) Adult motion picture theaters shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to provide an illumination of not less than one foot-candle of light as measured at the floor level.

3-14-18: RIGHT OF ENTRY:

1. The application for an adult business license shall constitute consent of the licensee and his/her agents or employees to permit the city's police department or any other agent of the city to conduct routine inspections of any licensed adult business during the hours the establishment is conducting business.

3-14-19: EXEMPTIONS, GENERALLY:

1. It is an affirmative defense to prosecution under this chapter a person appearing in a state of nudity or semi-nude did so in a modeling class operated:

(A) By a proprietary school, licensed by the state; a college, junior college or university supported entirely or partly by taxation;

(B) By a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college or university supported entirely or partly by taxation; or

(C) In a structure:

1. Which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing;

2. Where, in order to participate in a class a student must enroll at least three (3) days in advance of the class; and

3. Where no more than one nude model is on the premises at any one time.

Colo.R.Civ.P. 106. FORMS OF WRITS ABOLISHED

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be

brought upon the relation and complaint of any person. The Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdictions or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within twenty days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to place before the Court. The cost of preparing the record shall be advanced by the plaintiff, except that the Court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the Court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the Court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within forty days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within forty days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within thirty days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within fifteen days after service of the answer brief.

(VIII) The Court may accelerate or continue any action which, in the discretion of the Court, requires acceleration or continuance.

(IX) In the event the Court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of this action, the Court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and

such amendment shall relate back to the date of filing of the original complaint.

Amended eff. Jan. 1, 1986.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

13-51-105 Colo. Rev. Stat. (2003). Power and force of declaration

Courts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

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(9)

No. 02-1609

Supreme Court, U.S.
FILED
JAN 26 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE CITY OF LITTLETON, COLORADO,

Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., a Colorado limited liability company, CHRISTAL'S,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals To The Tenth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), entails a prompt judicial determination or a prompt commencement of judicial proceedings.

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STATEMENT OF THE CASE

This Court granted the City of Littleton's Petition for Writ of Certiorari on the issue of whether the procedures for appealing an adverse licensing decision in the Littleton adult entertainment establishment licensing ordinance satisfy the constitutional requirement of "prompt judicial review" established in *Freedman v. Maryland*, 380 U.S. 51 (1965), and applied to an ordinance targeting sexually oriented businesses in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). The Court previously granted *certiorari* on the same issue in *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), but did not reach the issue in either case.

A. The Challenged Littleton Ordinance

Section 3-14-2 of the Littleton Municipal Code defines "adult business" to include, *inter alia*, an adult bookstore, adult novelty store, or adult video store which devotes a "substantial or significant" portion of its stock in trade, floor space, or advertising costs to sexually explicit items or receives a significant or substantial portion of its revenues from such items. (Pet. Br. App., at 13a-14a) The terms "significant or substantial," are not defined in the ordinance.

"No person shall conduct an adult business without first having obtained an annual adult business license." L.M.C. 3-14-4(A). (Pet. Br. App., at 23a) The challenged Littleton ordinance, Sections 3-14-5, *et seq.*, sets forth the procedures for approval of adult entertainment establishment licenses by the City Clerk. (Pet. Br. App., at 23a-35a) (References to the record refer to Appellant's Appendix

filed in the Tenth Circuit). In particular, L.M.C., Section 3-14-5 sets forth detailed requirements for a license application. (Pet. Br. App., at 23a-28a) Section 3-14-8(B) of the Code provides for an appeal of the denial of a license to the City Manager. (Pet. Br. App., at 29a-30a) Sections 3-14-11, *et seq.*, delineate the procedures for the suspension or revocation of a license. (Pet. Br. App., at 31a-35a) Sections 3-14-8B(3) and 3-14-11(C)(5) (Pet Br. App., at 30a, 34a) provide that in the event the Littleton City Manager denies, suspends or revokes an adult entertainment license, this "shall be a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure (Col.R.Civ.Pro.) 106(A)(4)," which establishes the procedure for judicial review of administrative decisions in Colorado district courts. (Pet. Br. App., at 43a-47a)

B. Statement of the Facts

Respondent Z.J. Gifts D-4, L.L.C. (hereinafter "Z.J."), is a Colorado limited liability company doing business as "Christal's." (R., at 11) Z.J.'s operates its business at 6502 S. Broadway in the City of Littleton, Colorado. (R., at 8-9) Petitioner, the City of Littleton, Colorado (hereinafter "the City"), is a home-rule municipal corporation organized under the laws of the State of Colorado. (R., at 63) Z.J.'s business is located in a "B-2" zoned district, which permits the operation of retail businesses. (R., at 11)

Z.J.'s business sells lingerie, novelty items, greeting cards, cosmetics, oils and lotions, videocassette tapes, dvd's, and publications. (R., at 9-10) A portion of Z.J.'s stock-in-trade is sexually explicit in nature, which material is presumptively protected by the First and Fourteenth

Amendments to the United States Constitution, and Article II, Section 10 of the Colorado Constitution.

Prior to opening its business, Z.J. received a letter dated July 28, 1999 from Denise D. Naegle, Director of Community Development for the City of Littleton, indicating that the City had received "many comments" from citizens who were concerned that Z.J. intended to operate "a bookstore catering to the adult entertainment industry" and advising that adult uses were not permitted at this location. (R., at 448) City officials made also statements they consider Z.J.'s business to be an "adult entertainment establishment." (R., at 450) The City later denied Z.J.'s sales tax license application on the basis that the City determined Z.J. operated an adult business in an improper zone district. (R., at 450) Z.J., however, has never intended to operate an "adult entertainment establishment" at its location in Littleton, Colorado and has sought to obtain guidance from the City as to how to comply with the ordinance. None has been forthcoming.

Chapter 14 of the Littleton Municipal Code regulates "adult entertainment establishments" in the City of Littleton, Colorado. (R., at 30-52) Section 3-14-2 of the Code defines "adult business" to include, *inter alia*, an adult bookstore, adult novelty store, or adult video store which carries as a "substantial or significant" portion of its stock-in-trade sexually explicit items. (R., at 31) Section 3-14-3 imposes zoning restrictions on adult entertainment establishments, and provides that such businesses may only operate in industrial zoned districts. (R., at 36) No adult businesses have operated in the City of Littleton, Colorado since at least 1990. (R., at 208, l. 21-22)

Jon Payne, Senior Planning and Zoning Official for the City of Littleton, was unable to articulate any definition for the terms "substantial and significant" in the definition of adult bookstore at his deposition.[1] (R., at 460-461) Denise Naegle defined the terms "substantial and significant" to mean "an important use in the business." (R., at 464) She could not place any percentage or number on these terms.[2] (R., at 467) Based upon her interpretation,

[1] The following is an excerpt of Mr. Payne's deposition in the record:

Q. Now you have indicated you are involved with the enforcement of Littleton's zoning ordinances, is that correct?

A. Yes.

Q. And you've been doing that since 1973?

A. Actually, since 1995.

Q. And what is the city's interpretation or what do the terms "substantial and significant" mean within the Littleton ordinances?

A. Well, it would be something that a very – hmm. I have to think about that. I believe it's something that is – (pause.) I don't know that I can come up with a good definition of that.

(R., at 460, l. 13-461, l. 2)

[2] The following is an excerpt from Ms. Naegle's deposition in the record:

Q. What percentage would not be a significant or substantial portion of its stock in trade or interior floor space?

A. I couldn't say. It would depend.

Q. What would it depend on?

A. You know, I am not certain. I would have to think about it and do some research. I would probably want to know volume of sales and things like that. But I don't know. I can't say for certain.

Q. And you indicated before that in your opinion significant" meant an important part of the business?

A. Uh-huh.

(Continued on following page)

Ms. Naegle determined Z.J.'s business to be an adult business subject to the City's adult entertainment establishment licensing requirement. (R., at 464)

In three other places in the Littleton Municipal Code, the adjective "substantial" is used to modify the words "improvement" or "damage" as "50% of the market value of the structure" before improvement or damage to the property in the context of vested rights or flood plain regulation. *See,* L.M.C., Section 10-6-2, definitions relating to the flood plain ordinance, and Section 10-13-4, relating to vested property rights. (Resp. App., at 13-14)

C. Proceedings in the Courts Below

Federal Court.

On August 26, 1999, Z.J. brought the instant action pursuant to 42 U.S.C. Section 1983, challenging on numerous grounds the constitutionality of the Littleton adult entertainment establishment licensing ordinance, L.M.C., Sections 3-14-1, *et seq*. The parties filed cross motions for summary judgment. (R., at 70-115, 373-422) After hearing oral arguments, the district court upheld the Littleton

Q. And could you translate that into any kind of percentage of revenues?

A. No, I couldn't.

(R., at 467, l. 9-24)

ordinance in all respects on March 31, 2001. (Pet. App., at 40-67) The district court rejected all of Z.J.'s constitutional challenges to the Littleton ordinance, and further determined Z.J. clearly operated "an adult entertainment business as defined in Chapter 14 of the Littleton Municipal Code." The district court found that thirty-three percent adult material constitutes a significant or substantial portion of the store's inventory.

Z.J. appealed the district court order. The United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part. (Pet. App., at 1-39) More particularly, after hearing oral arguments in the case, the Tenth Circuit ordered supplemental briefs on the issues of standing and abstention under *Younger v. Harris*, 401 U.S. 37 (1971). In the supplemental briefs, the Tenth Circuit was advised of state court criminal and nuisance actions brought by the City against Z.J. *See* discussion, *infra*.

The Tenth Circuit determined that the City "explicitly waived" the issue of abstention under *Younger v. Harris*, 401 U.S. 37. (Pet. App., at 9, n. 4) The Court of Appeals found that Z.J. did not have standing to challenge the civil disability provisions or the suspension and revocation provisions of the Littleton ordinance. (Pet. App., at 11) *See, Essence Inc, v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002), *cert. denied*, 537 U.S. 947 (2002). The panel went on to find that Z.J. did not have standing to challenge the terms "substantial or significant" on vagueness grounds. (Pet. App., at 12-14) The Tenth Circuit determined that these terms were readily susceptible to a narrowing construction by state courts and suggested that a common method has been to develop a percentage that will act as a guide as to what constitutes substantial and

significant. Z.J.'s challenge to a 21 year old age restriction was found to be moot. (Pet. App., at 14-15)

The Tenth Circuit then discussed in detail the opinions in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), and found the requirements of obtaining fingerprinting and a zoning certificate prior to obtaining an adult entertainment license were "unconstitutional for failure to specify a time limit within which the City must act." (Pet. App., at 20-24) The Court upheld a requirement that a sales tax license be obtained from the City prior to obtaining an adult entertainment establishment license. (Pet. App., at 21) Z.J. filed a petition for panel rehearing on this issue, which petition was denied. (Pet. App., at 68-69)

The Tenth Circuit then addressed the issue of prompt judicial review and, after reviewing the case law from the Supreme Court and other circuits on this issue, determined that "prompt judicial review" required a prompt judicial determination. The Court of Appeals examined the language of Justice O'Connor's plurality opinion in *FW/PBS* in detail and determined it did not "necessarily indicate any intent to weaken the second *Freedman* requirement" which the plurality opinion had characterized as "essential." (Pet. App., at 27-28) Since "parties always have *access* to the courts" and "without a decision, the most exhaustive review is worthless," *quoting Baby Tam v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998) (emphasis in original), the Tenth Circuit concluded that Justice O'Connor's plurality opinion's "'avenue for prompt judicial review' requirement makes far more sense if it is understood to mean a prompt final judicial determination." (Pet. App., at 28) The panel stated, "[i]f Justice O'Connor had intended to adopt a different judicial review

requirement [from *Freedman*] for licensing cases, she could have done so explicitly, just as she explicitly rejected the burden-shifting requirement." (Pet. App., at 30) The panel recognized that the Fourth, Sixth, and Ninth Circuit had previously determined that Justice O'Connor's plurality opinion in *FW/PBS* "gave no indication that she was modifying the second requirement of prompt judicial review." *Nightclubs Inc. v. City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000); *See also*, *Baby Tam*, 154 F.3d at 1102; *11126 Baltimore Boulevard v. Prince George's County*, 58 F.3d 988, 999 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1010 (1995). (Pet. App., at 30-31)

The Tenth Circuit also recognized that the decision in *Thomas v. Chicago Park District*, 534 U.S. 316, n. 2 (2002), had specifically distinguished the ordinance struck down in *FW/PBS* from a content neutral licensing scheme because it targeted "businesses purveying sexually explicit speech." (Pet. App., at 31) Based upon the focus on the content of the "controversial" speech in the Littleton ordinance, the Court of Appeals concluded "the danger that an ordinance like Littleton's may be improperly used as a subterfuge for censorship is too great to overlook the necessity for a prompt judicial determination." (Pet. App., at 31)

Because the procedure provided in the Littleton ordinance, Colorado Rules of Civil Procedure 106(a)(4), "does not assure that license decisions will be given expedited review," the Littleton ordinance was determined to be unconstitutional. (Pet. App., at 32) Finally, the panel upheld the City's location restrictions on adult entertainment establishments. (Pet. App., at 33-38)

The City filed a petition for rehearing en banc that was denied. (Pet. App., at 68-69) Z.J. also filed a petition for rehearing that was denied. The City filed the petition for certiorari in this case that was granted on October 14, 2003.

State Court.

During the pendency of this case in federal court, the City initiated actions in state court to enforce the challenged ordinance. The City filed 2,620 separate charges in the Littleton Municipal Court involving alleged licensing and zoning violations against both Respondent Z.J. and its president, Ross Jackson. (Supplemental Brief of Plaintiff-Appellant, 10th Circuit, filed July 2, 2002, Exhibit E) Each municipal court violation carries a sentence of up to one year in jail and/or a $1000 fine. (R., at p. 414) These municipal court violations remain pending subject to interlocutory appeals by both sides.

In addition, Z.J. was convicted in the Littleton Municipal Court on 759 counts of various sales tax code violations and fined $62,325. These convictions were affirmed by the Arapahoe County District Court on October 24, 2002. The Colorado Supreme Court granted Z.J.'s petition for certiorari on June 2, 2003. *Z.J Gifts D-4, L.L.C. v. City of Littleton*, 2003 WL 21260833 (2003).

The City also brought a civil nuisance action against Z.J. in the Arapahoe County District Court on January 18, 2000. (Supplemental Brief of Plaintiff-Appellant, 10th Circuit, Exhibit A) The City obtained an order enjoining the operation of Z.J.'s business that was based upon the district court's opinion in the federal case on August 24, 2001. (Supplemental Brief of Plaintiff-Appellant, Exhibit

B) Z.J. filed a motion for stay pending appeal on September 28, 2001, which motion was denied by the district court on December 27, 2001 "nunc pro tunc to the 14th day of December, 2001." (Resp. App., at 1) On January 28, 2002, the City was unsuccessful in attempting to enforce this order through a contempt citation in the Arapahoe County District Court, which stated that there is "evidence indicating things have changed and that there are significantly less items of an adult nature being sold." (Supplemental Brief of Plaintiff-Appellant, Exhibit C, p. 64, l. 3-4) The injunction order was later reversed by the Colorado Court of Appeals in an unpublished opinion on February 20, 2003. (Resp. App., at 2-12)

SUMMARY OF THE ARGUMENT

The "essential" requirement of prompt judicial review imposed by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), entails a prompt judicial determination in order to obviate the dangers of censorship inherent in a system of licensing speech. Mere commencement of a judicial proceeding has no importance if a license applicant does not get an assurance of prompt judicial participation that results in a determination on the merits. "Parties always have *access* to courts." *Z.J. Gifts D-4, L.L.C. v. City of Littleton* (Pet. App., at 20) If the second "essential" *Freedman* requirement of "prompt judicial review," is reduced to the ability to file a case in court, it will be rendered meaningless. Then, only the first *Freedman* safeguard will retain any significance for licensing laws that target businesses based upon the content of the expression they distribute, and the core policy of Freedman of preventing delay will be greatly undermined.

Under the challenged ordinance, there exists no guarantee that any adult business will operate while any judicial licensing proceedings are pending even before the trial court, nor is there any guarantee that any judicial review that might be available (either in the trial court or on direct appeal) "will be required in the shortest fixed period compatible with sound judicial resolution." *Freedman*, 380 U.S. at 39. Without such an express constitutional guarantee, trial courts (often unconsciously due to docket pressures) will be hard pressed to take action to disturb "the status quo of silence" imposed upon a business seeking government permission to present protected expression. *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 286 (2001). "Even if that [party] is willing and able to litigate the case successfully, the eventual relief may be 'too little and too late.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988), *quoting Freedman*, 380 U.S., at 57. Limiting the judicial review requirement of *FW/PBS* to prompt commencement of judicial proceedings does not satisfy "[t]he core policy underlying *Freedman* . . . , because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS*, 493 U.S., at 228.

The City alleges that Z.J. operates an adult video store as defined in the Littleton Municipal Code as devoting a "substantial or significant" amount of its inventory, or floor space as specifically defined adult material. This is not just a ministerial decision but rather involves the appraisal of facts and the exercise of judgment. City officials are unwilling or unable to articulate any objective measure of what this means. As such, the determination of substantial or significant is not just a ministerial task but

involves the actual determination concerning an unspecified amount of speech material of a particular content.

The Court has consistently required that objective standards control licensing decisions so that the process is transparent and can be effectively reviewed by a court. "Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable expression." *City of Lakewood*, 486 U.S. at 758.

Here, the Littleton definitions provide no guideposts, nor do city officials even attempt to offer any guideposts to assist a business seeking to comply with the ordinance or to a court reviewing licensing decisions to determine if the licensor is suppressing a particular point of view. This case offers a clear example of how a supposedly "content neutral" licensing ordinance may be used as a means to suppress disfavored speech. The City's assertion that this argument was not raised is not supported by the record where Z.J. raised the issue of overbroad discretion at every stage of the case.

In *Thomas v. Chicago Park District*, 534 U.S. 316, 322, and n. 2, the Court distinguished the ordinance struck down in *FW/PBS* from "a content neutral permit scheme regulating speech in a public forum" since "it involved a licensing scheme that targets businesses purveying sexually explicit speech." The Littleton licensing ordinance can be distinguished from content neutral licensing laws

for the same reason. As such, the City's pleas that the licensing ordinance be evaluated as a content neutral time, place and manner restriction under an intermediate level of scrutiny should be rejected.

Contrary to the protests of the City, it is *not* impossible, or even particularly difficult to meet constitutional requirements to protect against the suppression of expression. As stated by the Court, "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

The Tenth Circuit upheld many provisions of the Littleton ordinances that more directly address the adverse external secondary effects of adult entertainment establishments. The most important of these is the locational restriction that banishes such businesses to less than 1% of the total land area of Littleton within limited areas in industrial zoned areas. Without a licensing requirement, the City of Littleton has numerous tools with which to regulate these businesses. The City can also enforce laws of general application against any business, including bookstores, selling any type of material, and obtain a closure in the case of violations of Littleton health and safety regulations. In addition, the City remains free to enforce any criminal laws in the event that actual crimes occur in or around such businesses, and close such businesses if they constitute a public nuisance. *See, Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986).

ARGUMENT

I. BY FAILING TO PROVIDE FOR A SPECIFIC TIME PERIOD FOR PROMPT JUDICIAL DETERMINATION OF LICENSING DECISIONS, THE LITTLETON ADULT ENTERTAINMENT ESTABLISHMENT ORDINANCE CREATES AN INVALID PRIOR RESTRAINT THAT RESULTS IN COMPELLED SILENCE WHILE JUDICIAL REVIEW CONTINUES FOR AN UNSPECIFIED PERIOD OF TIME

A. The Requirement of a License to Operate a Business Providing Protected Speech Operates as a Prior Restraint on Expression and is Presumptively Unconstitutional

The First Amendment's guarantee of free speech prohibits a wide assortment of government limitations on expression:

> but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the "evils" of the printing press in 16th- and 17-century England. The Printing Act of 1662 had "prescribed what could be printed, who could print, and who could sell." Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L.Rev. 245, 248 (1982). It punished the publication of any book or pamphlet without a license and required that all works be submitted for approval to a government official, who wielded broad authority to suppress works that he found to be heretical, seditious, schismatical, or offensive.

Thomas v. Chicago Park District, 534 U.S., at 778-779, *quoting*, F. Siebert, Freedom of the Press in England, 1476-1776, p. 240 (1952). At least two licensors lost their positions for licensing books that were apparently controversial. F. Siebert, Freedom of the Press in England, 1476-1776, p. 244 (1965).

The Printing Act of 1662 included restrictions on the retail sales of publications.

> In addition to defining who could print and who could import books, the Act of 1662 set definite restrictions on the retail sale of printed books. Booksellers were limited to members of the Stationers Company and to those persons specially licensed by the Lord Bishop of the diocese in which the retailer resided. All "haberdashers of small wares, ironmongers, chandlers, and shopkeepers' were specifically prohibited from engaging in the book trade. An exception was made in the case of the shopkeepers in and about Westminster Hall who had been in business before 1661."

Id., at 240. The Printing Act of 1662 also authorized general search warrants for the seizure of books and papers. *Id.*, at 253-54.

"The English licensing system expired at the end of the 17th century, but the memory of its abuses was still vivid enough in colonial times that Blackstone warned against the 'restrictive power' of such a 'licenser' – an administrative official who enjoyed unconfined authority to pass judgment on the content of speech. 4 W. Blackstone, Commentaries on the Laws of England 152 (1769)." *Thomas v. Chicago Park District*, 534 U.S., at 779.

This Court has always applied the strictest level of scrutiny to any law requiring a license to engage in speech

activity. In *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), the Court recognized that "[t]he struggle for the freedom of the press was primarily directed against the power from the licensor."

> [T]he liberty of the press became initially a right to publish without a license what formerly could be published only with one. While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.

Id., at 451-452.

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969), the Court referred to "the prior restraint of a license," recognizing that all laws subjecting the exercise of First Amendment freedoms to a prior license requirement act as prior restraints. Although the mere fact that licensing requirements constitute prior restraints does not make them *per se* unconstitutional, in a long line of decisions implementing the Framers' basic hostility to laws licensing speech, the Court has repeatedly stricken the overwhelming majority of such laws, applying a heightened level of scrutiny.[3]

[3] *See e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939) (permit needed to lease a hall for a public meeting involving advocacy of obstruction of the government); *Schneider v. State*, 308 U.S. 147 (1939) (permit needed to distribute handbills on public streets or sidewalks); *Cantwell v. Connecticut*, 310 U.S. 216 (1940) (permit needed for charitable or religious solicitations); *Largent v. Texas*, 318 U.S. 418 (1943) (permit needed for sale of books or tracts); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (licenses tax for selling door to door stricken as applied to Jehovah's Witnesses engaging in First Amendment activity); *Saia v.*

(Continued on following page)

The United States Supreme Court has vigorously and repeatedly condemned any system of prior restraint of First Amendment rights. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (injunction); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66-67 (1989) (pretrial seizure under RICO statute). The constitutional protection against prior restraints is so exalted that "a person faced with such an unconstitutional licensing law may ignore it and may engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151.

In determining the existence of an impermissible prior restraint, courts must begin with the premise that: "Any system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (*quoted* in *Vance v. Universal Amusements*, 445 U.S. 308, 317 (1980); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 225. *See also, Bantam Books, Inc. v. Sullivan*, 372 U.S.

New York, 334 U.S. 558 (1948) (permit needed to sound amplification devices); *Kunz v. New York*, 340 U.S. 290 (1951) (permit needed to hold public worship meetings on streets); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 496 (1952) (permit required for exhibition of motion picture films); *Gelling v. Texas*, 343 U.S. 960 (1952) (permit required for exhibiting motion picture films); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (permit needed to solicit members for an organization); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (films could only be exhibited to minors if first permitted by a board of censors); *Shuttlesworth*, 394 U.S. 147 (parade permit); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947 (1984); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (annual permit needed to operate any news rack on public sidewalks).

58, 70 (1962); *New York Times v. United States*, 403 U.S. 713, 714 (1971).

The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Underlying the distinction is a principle strongly rooted in our law:

> *[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.* It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. *See Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958).

Southeastern Promotions, Ltd., 420 U.S. at 558-559 (emphasis in original). *See also, Vance*, 445 U.S. at 525-26.

Since the instant case involves a regulation that requires persons to obtain a license to present protected speech prior to its expression, these cases make it clear that "a heavy presumption" exists against the constitutional validity of the Littleton adult entertainment establishment licensing ordinance.

B. *Freedman v. Maryland*, 380 U.S. 51 (1965), Made Clear That Prompt Judicial Determination Was a Constitutionally Required Procedural Safeguard Necessary to Obviate the Dangers of a Licensing System

"The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under

procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions, Ltd.*, 420 U.S. at 558, *quoting Freedman v. Maryland*, 380 U.S., at 57.

In *Freedman v. Maryland*, 380 U.S., at 57, this Court held that a law requiring the submission of films for approval by a government board that lacks certain procedural safeguards "contains the same vice as a statute delegating excessive administrative discretion." In *Freedman*, Maryland had created a licensing board empowered to deny licenses for the exhibition of motion picture films that were obscene, or "tend . . . to debase or corrupt morals or incite to crimes." *Id.*, at 52, n. 2. The statute provided the applicant "the right of appeal" to the Baltimore City Court with "a further right of appeal" to the Court of Appeals of Maryland. *Id.*, at 55. The Court focused on the petitioner's argument that the board's decision "without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time consuming appeal to the Maryland courts and succeeds in having the Board's decision reversed." *Id.*, at 54-55.

The Court determined:

> There is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months. *United*

Artists Corp. v. Maryland State Board of Censors, 210 Md. 586, 124 A.2d 292 [1956].

Id., at 55.

The Court recognized that an administrative official would be less sensitive to the First Amendment interests than a detached judicial officer. "Because a censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests of free expression. And if made unduly onerous by reason of delay or otherwise, to seek *judicial review*, the censor's determination may in practice be final." *Id.*, at 57-58 (footnote omitted and emphasis added). *See also*, *Thomas v. Chicago Park District*, 534 U.S. 316 ["[a] licensing body likely will overestimate the dangers of controversial speech when determining, without regard to the film's actual effect on the audience, whether the speech is likely 'to incite' or 'corrupt the morals' "], *quoting Freedman*, at 52-53, n. 2.

Thus, the Court made it clear that actual judicial participation was necessary before a final restraint on protected expression could be imposed:

> The teaching of our cases is that, because only *a judicial determination* in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring *a judicial determination* suffices to impose a valid final restraint. . . . Any restraint imposed in advance of *a final judicial determination on the merits* must similarly be limited to preservation of the status quo for the shortest fixed period compatible with *sound judicial resolution*. . . . [T]he procedure must also assure *a prompt judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license. Without these safeguards it may prove to burdensome to seek *review* of the censor's determination.

Id., at 58-59 (emphasis added, citations and footnotes omitted).

The Court found the Maryland procedures for judicial review were unconstitutional for three distinct reasons. First, "the burden of instituting judicial proceedings and of persuading the court that the film is protected expression" rests on the exhibitor. *Id.*, at 60. Second, "exhibition is prohibited pending judicial review, however protracted." *Id.* "Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination." *Id.*

While *Freedman* repeatedly used the terms judicial "review," "participation," "determination," "resolution," and "decision" interchangeably, the terms "commencement" of judicial proceedings or "access" to judicial review were not mentioned anywhere in the opinion. The fact that the Maryland statute specifically provided "the right of appeal" was not adequate to save the statute. *Freedman* was unambiguous that judicial review meant judicial determination.

C. Subsequent Decisions, Including *FW/PBS, Inc. v. City of Dallas*, Have Not Relaxed *Freedman*'s Essential Requirement of Prompt Judicial Determination

Although the licensing scheme in *Freedman* required the prior submission of individual films to a board of

censors for pre-exhibition approval, the Supreme Court's subsequent opinions have made clear that *Freedman's* procedural safeguards apply not only whenever a presumptively protected publication or film is subjected to the prior restraint of a license requirement, but, indeed, whenever a First Amendment business is subject to the requirement of obtaining a license prior to presenting expression.[4] Moreover, a review of the prior restraint cases following *Freedman* does not give any indication that the explicit *Freedman* requirements relating to "prompt judicial review" would be relaxed to be satisfied by the mere commencement of judicial proceedings.

The Supreme Court in *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, recognized that the swift judicial review requirement would apply to the discretionary parade permit challenged in that case. Prior to striking down convictions for failure to obtain a parade permit based upon the application of the law by city officials, the Court assumed that the Alabama Supreme Court's narrowing construction rendered the Birmingham ordinance constitutional on its face. However, the Court noted that "the validity of this assumption would depend upon . . . the availability of expeditious judicial review of the Commission's refusal of a permit." *Id.*, at 155, n. 4, *citing Freedman, quoted* in *FW/PBS, Inc. v. City of Dallas*, 493 U.S., at 228. In his concurring opinion, Justice Harlan explicitly

[4] *See e.g., Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) [stating that a bookstore is "presumptively under the protection of the first Amendment"]; *Smith v. California*, 361 U.S. 147, 150 (1959) ["certainly a retail bookseller plays a most significant role in the process of the distribution of books."]

stated, "nor did the State of Alabama provide for a speedy court review of the denial of a parade permit" because under the *mandamus* procedure provided, the "state court is not obliged to render a decision within any fixed period of time." *Id.*, at 161, n. 3 (Harlan, J. concurring).

Southeastern Promotions, Ltd v. Conrad, 420 U.S. 546, held that denial of municipal facilities for a production of a play constituted an improper prior restraint for failure to provide *Freedman* procedural safeguards. The "system did not provide a procedure for prompt judicial review." *Id.*, at 561. Although the trial court heard the petitioner's motion for preliminary injunction within a few days (which motion was denied), "effective review on the merits was not obtained until more than five months later." *Id.*, at 562. The Court concluded that "[t]he procedural shortcomings that form the basis for our decision are unrelated to the standard that the board applied. . . . The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances." *Id.*

In *National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*), the Court entered a stay of an injunction against marching and displaying swastikas where appellate review could take over a year to complete. "If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review. Absent such review, the State must instead allow a stay." *Id.* (citations omitted), cited in *FW/PBS, Inc, v. City of Dallas*, 493 U.S. at 228.

The Court struck down a discretionary licensing scheme for newsracks on public property in *City of Lakewood v. Plain Dealer Association*, 486 U.S. 750, 758 (1988). In discussing the ability of the newspaper to bring a facial constitutional challenge to the ordinance, the Court acknowledged that, in the absence of an actual judicial determination, speech rights could be extinguished under the licensing scheme. "Until a judicial decree to the contrary, the licensor's prohibition stands. In the interim, opportunities for speech are irretrievably lost." *Id.*, *citing Freedman*, 380 U.S. at 57.

The same term, in *Riley v. National Federal of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Supreme Court held the procedural safeguards of *Freedman* applied to a content-neutral licensing requirement for professional fundraisers. The licensing requirement was unconstitutional because the ordinance did not "on its face . . . purport to [limit the time period within which] a determination must be made [by the licensor]." *Id.*, at 802. The Court recognized the constitutional significance of the state's previous practice of allowing fundraisers to solicit as soon as their applications were filed. "Then, delay permitted the speaker's speech; now, delay compels the speaker's silence." *Id.*

Following this consistent line of cases, the Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, determined that certain *Freedman* safeguards applied to a licensing ordinance targeting sexually oriented businesses. The Court, in Justice O'Connor's plurality opinion, identified the three procedural safeguards required by *Freedman:* "'(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of

that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.'" *Id.*, at 227. The plurality opinion held that the first two of the three *Freedman* procedural safeguards were mandated where a licensing requirement was placed on sexually oriented businesses.

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained and there must be the possibility of prompt judicial review in the event that the license is erroneously denied. *See Freedman supra*, at 51, 13 L.Ed.2d 649, 85 S. Ct. 734. *See also Shuttlesworth [v. City of Birmingham]*, 394 U.S. [147], at 155, n.4, 22 L.Ed.2d 162, 89 S.Ct. 935 [(1969)] (content-neutral time, place, and manner regulation must provide for "expeditious judicial review"); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 53 L.Ed.2d 96, 97 S. Ct. 2205 (1977).
>
> * * *
>
> [T]he Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold that the failure to provide these essential safeguards

> renders the ordinance's licensing requirements unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the Court on remand.

Id., at 228-229.

Justice O'Connor's plurality opinion determined the third *Freedman* safeguard was not as "essential" in this context and would not apply. Thus, the third *Freedman* safeguard would not apply because, unlike *Freedman*, the licensing system was not "direct censorship of particular expressive material." *Id.*, at 229. "Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the City reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.*

Section II.B of the plurality opinion stressed the need for "prompt" and "expeditious" judicial review by repeating these terms no less than five times when referring to the "essential" (mentioned twice) safeguard of judicial review. *Id.*, at 228, 229. As noted in the en banc Fourth Circuit decision in *Baltimore Boulevard*, 58 F.3d at 1000, "Justice O'Connor's decision in *FW/PBS* cannot be properly read to relax the *Freedman* prompt judicial review requirement. . . . " The Tenth Circuit's careful analysis of the language used in the plurality opinion in the opinion below, examined the use of the words "possibility," "availability," and "avenue" of judicial review, and concluded that language "most likely amounts to an acknowledgment that it is up to the plaintiff to decide whether or not to seek judicial review. This language does not necessarily indicate any intent to weaken the second *Freedman* requirement." (Pet. App., at 28)

It is fundamental that the doors of the courthouse are open to all persons. "Parties always have *access* to courts." (Pet. App., at 28) (emphasis in original). As recognized in Justice White's dissenting opinion in *FW/PBS*, "no one suggests that licensing decisions are not subject to immediate appeal to the courts." *FW/PBS*, 493 U.S. at 248 (White, J. dissenting). Mere commencement of a judicial proceeding has no importance if a license applicant does not get an assurance of prompt judicial participation that results in a determination on the merits. If the second *Freedman* requirement of "prompt judicial review," twice identified in Justice O'Connor's *FW/PBS* plurality opinion as an "essential safeguard" to protect free speech, *Id.*, at 228, is reduced to the ability to file a case in court, it will be rendered meaningless. Then, only the first *Freedman* safeguard will retain any significance for licensing laws that target businesses based upon the content of the expression they distribute.

The City asserts that the challenged licensing ordinance is not a censorship since it involves no exercise of discretion by a licensing official, but rather only mundane ministerial decisions. However, this assertion is seriously undercut by an examination of the criteria (or lack thereof) used to make the basic decision as to whether a business qualifies as an adult entertainment establishment that requires a special license to present protected speech. The City alleges that Z.J. operates an adult video store as defined in the Littleton Municipal Code as devoting a "substantial or significant" amount of its inventory or floor space to specifically defined adult material. This is not a mundane ministerial decision but rather involves the appraisal of facts and the exercise of judgment. As discussed in detail, *infra*, City officials are unwilling or

unable to articulate any objective measure of what this means. As such, the determination of substantial or significant is not merely a ministerial task and does involve the actual determination of the content of speech material. Indeed, it presents exactly the type of licensing scheme that carries with it the strong possibility of suppression of disfavored expression.

D. The Littleton Adult Business Licensing Ordinance Lacks the Requisite Procedural Safeguards

As in *FW/PBS*, the Littleton Ordinance "fails to provide an avenue for *prompt judicial review* so as to minimize suppression of speech in the event of a license denial." *Id.* While L.M.C., Sections 3-14-8(B)(3) and 3-14-11(C)(5) (Pet. Br. App., at 28a, 34a), in conjunction with Colo. R. Civ. Pro. 106(a)(4) (Pet. Br. App., at 44a-45a), establish a mechanism for an appeal of the denial, suspension or revocation of a license, these enactments in no way require: (1) an assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (2) a guarantee of swift final judicial action. The burden of initiating any judicial review rests on the shoulders of a person seeking to present protected expression.

Under the Littleton ordinance, there is no "assurance of prompt judicial review." The City Clerk has thirty (30) days to make an initial determination on a license followed by a hearing before the City Manager that can take up to an additional sixty (60) days (ten days for appeal, thirty days for a hearing, twenty days for a decision) before a decision. *See*, L.M.C., Section 3-14-8(B) (Pet. Br. App., at 29a-30a) Pursuant to Colo. R. Civ. Pro. 106(a)(4)(III), the

district court must order the administrative body to prepare the record for review on a specified date, which shall be after the date upon which the answer must be filed. (Pet. Br. App., at 45a) There is no specified period in which the district court must enter this order, nor is there any specific time period set forth in Rule 106 concerning the time in which the record must be filed. In the experience of undersigned counsel, it can take up to thirty (30) days or longer before the district court even signs the order certifying the record, due to the press of court business. Once the order certifying the record is entered, it can often take up to 120 days before the record is finally prepared.

Rule 106(a)(4)(IV), Colo. R. Civ. Pro., then provides for a briefing schedule of eighty-five (85) days after date the record is filed (Pet. Br. App., at 45a), not including common additional periods for mailing and extensions of time. Once all briefs are filed, there is no specific period in which the district court is required to issue a ruling. Moreover, unlike the Memphis procedure struck down in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), judicial review brought pursuant to Colo. R. Civ. Pro. 106 does *not* take "precedence over other litigation." Thus, from the beginning of the licensing process, it may take 325 days or longer before the matter is before a court for a final judicial decision. The time in which the court may make a decision on the merits is open ended. As such, the procedure provided for in the Littleton adult entertainment establishment licensing ordinance does not guarantee a prompt judicial determination as required by *FW/PBS* and *Freedman*.

As the Supreme Court specifically stated in *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44, in the

absence of immediate judicial review "the state must instead allow a stay." *See, Baltimore Boulevard*, 58 F.3d at 1001 ["the County could avoid the constitutional problem engendered by its present scheme by permitting adult bookstores to operate until judicial determination is rendered . . . "]. *See also, Nightclubs, Inc.*, 202 F.3d, at 894. As discussed above, there is no assurance of prompt judicial participation to protect against the erroneous deprivation of First Amendment rights.

Under the challenged ordinance, there exists no guarantee that any adult business will operate while any judicial licensing proceedings are pending even before the trial court, nor is there any guarantee that any judicial review that might be available (either in the trial court or on direct appeal) "will be required in the shortest fixed period compatible with sound judicial resolution." *Freedman*, 380 U.S. at 39. Without such an express constitutional guarantee stated by this Court, trial courts (often unconsciously due to docket pressures) will be hard pressed to take action to disturb "the status quo of silence" imposed upon a business seeking government permission to present protected expression. *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. at 286. "Even if that [party] is willing and able to litigate the case successfully, the eventual relief may be 'too little and too late.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S., at 758, *quoting Freedman*, 380 U.S. at 57.

"Swift judicial review is the remedy needed by those held back from speaking." *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. at 285. "Until a judicial decree to the contrary, the licensor's prohibition stands." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. at 758. In the absence of actual judicial determination, "delay

compels the speaker's silence." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. at 802. A constitutional requirement limiting the judicial review requirement of *FW/PBS* to prompt commencement of judicial proceedings does not satisfy "[t]he core policy underlying *Freedman* . . . , because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS*, 493 U.S., at 228. As such, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

Under the procedures contained in the challenged ordinance, such judicial review could take years. In the absence of a guarantee of a swift judicial determination, the failure of the Littleton ordinance to provide a mandatory stay of enforcement or a provisional license pending review results in a system of prior restraint that fails to properly protect freedom of expression. This Court, in a long line of cases, has consistently required judicial involvement in any decisions relating to the licensing of protected speech due to the dangers inherent in such systems of government oversight of expression. As illustrated by the experience of the framers of the Constitution and continuing with voluminous litigation on this subject in the lower courts and this Court, governmental entities have been relentless in attempting to impose their will and drive out protected businesses through licensing systems to "protect" the community from controversial speech. This case presents yet another opportunity for the Court to require meaningful procedures to obviate the dangers of prior restraints on expression. Mere commencement of the process of judicial proceedings fails to provide "adequate bulwarks" to guard against this danger.

FW/PBS, 493 U.S., at 230 *quoting Bantam Books v. Sullivan*, 372 U.S. at 66. As in *Freedman* and *FW/PBS*, the Littleton licensing scheme fails to meet the standards required by the First Amendment.

II. THE TERMS "SUBSTANTIAL" AND "SIGNIFICANT" IN THE DEFINITION OF ADULT BOOKSTORE PERMIT LICENSING OFFICIALS TO EXERCISE OVERBROAD DISCRETION IN DETERMINING IF A BUSINESS REQUIRES A SPECIAL LICENSE TO PRESENT EXPRESSION AND RESULTS IN A CENSORSHIP SCHEME WITHOUT ANY EFFECTIVE AVENUE OF PROMPT JUDICIAL REVIEW TO CHALLENGE THE FINDING THAT A BUSINESS IS AN ADULT BOOKSTORE

While the criteria for granting a license have been held to provide objective standards, the requirement for a license itself involves the exercise of broad discretion by Littleton City officials. Section 3-14-2 of the Littleton Municipal Code defines "adult business" to include, *inter alia*, an adult bookstore, adult novelty store, or adult video store which devotes a "substantial or significant" portion of its stock-in-trade, floor space, or advertising costs to sexually explicit items or receives a significant or substantial portion of its revenues from such items.[5] (Pet. Br. App.,

[5] Littleton Municipal Code, Section 3-14-2 defines an "adult bookstore, adult novelty store, or adult video store" as:

> A commercial establishment which 1) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; 2) receives a significant or substantial portion of its revenues from; or 3) devotes a significant or substantial

(Continued on following page)

at 13a-14a) The terms "significant or substantial," are not defined in the ordinance.[6] Thus, the City retains broad discretion to determine whether or not a business even needs to obtain a license to present protected expression.

The City repeatedly asserts that the Littleton ordinance is not a censorship ordinance because it involves only content neutral, non–discretionary criteria in determining whether or not a license to present protected expression should be granted or denied in the City of Littleton. However, this argument ignores the fact that the requirement of a license requires a discretionary determination by a city official of whether or not a "substantial or significant" portion of a business is devoted to defined adult material. In the instant case, Z.J. seeks to operate a

> portion of its advertising expenditures to the promotion of: the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

The terms, "significant or substantial," and "characterized" are not defined in the ordinance.

[6] The Littleton ordinance's definition is far broader than the definition in the ordinance struck down in *FW/PBS* which defined "Adult Bookstore or Adult Video Store to be "a commercial establishment which as one of its principal business purposes offers for sale or rental" sexually explicit materials. *FW/PBS*, 493 U.S. 253-254, n. 5, (Scalia, J. dissenting). As noted by Justice Scalia, "the phrase 'as one of its principal business purposes' can connote that the material containing the specified depictions and descriptions does not merely account for a substantial proportion of sales volume but is also intentionally marketed *as material of that character*." *Id.*, at 260 (emphasis in original).

non-regulated adult business, but the City refuses to provide any guidance as to what differentiates a non-adult business from an adult business. As a result, Z.J. is effectively denied prompt judicial review because it is only entitled to such review if it applies for a license to operate an adult business, thereby admitting that it is, in fact, an adult business.

In the absence of any application to operate an adult business, the City official's determination that Z.J.'s business contains a "substantial or significant" amount of adult material is all that is required to impose the requirement of obtaining a license prior to sale of protected expression. Thus, in order to present a "substantial or significant" amount of adult expression in Littleton, Z.J. must submit to the subjective decision of the Littleton zoning official and the City clerk. Otherwise, Z.J. is deemed to be flouting the law if it disagrees with the determination of a City official. The only avenue for judicial review is filing a suit for violation of its civil rights or defending itself in civil or criminal proceedings. Z.J. has had to deal with all three while exposing itself and its officers to the potential of thousands of years of imprisonment and millions of dollars in fines.

Moreover, Z.J. was denied a sales tax license by Jon Payne because Denise Naegle determined Z.J. "could be categorized as an adult business." (R., p. 450-51) Failure to obtain a sales tax license is one of the non-discretionary grounds for denial of an adult entertainment establishment license. L.M.C., Section 3-14-8(A)(7) (Pet. Br. App., at 28a) Thus, the discretionary decision of whether an applicant carries a substantial or significant amount of adult material will result in denial of a sales tax license which in turn disqualifies the applicant from obtaining a license to

present protected expression. The fact that the discretion is one step removed from the adult entertainment license application process does not change the fact that the license may be used as a tool of censorship.

The difficulty of the use of terms like "substantial or significant" in creating substantive standards of conduct was forcefully driven home this term in the unanimous decision in *United States v. Banks*, 540 U.S. ___, 124 S.Ct. 521, Case No. 02-473 (Dec. 2, 2003). In *Banks*, this Court reversed a Ninth Circuit decision that a 15 to 20 second delay before a forcible entry and search of a residence violated the Fourth Amendment. The Court criticized the lower court's analysis that used the terms "significant" and "substantial" in determining the reasonableness of a suspicion of exigent circumstances. "Instructions couched in terms like 'significant amount of time' and 'an even more substantial amount of time,' 282 F.3d, at 704, *tell very little*." *Banks*, sl. op., p. 11, 124 S.Ct., at 528 (emphasis added).[7]

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[7] *United States v. Banks*, did not involve any First Amendment issues. However, the Court has consistently required judicial participation in the seizure of speech materials by insisting that search warrants list the items to be seized with "the most scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 485 (1965) *See also, New York v. P.J. Video*, 475 U.S. 868 (1986); *Roaden v. Kentucky*, 413 U.S. 496 (1973) ; *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Heller v. New York*, 413 U.S. 483 (1973). Moreover, even a probable cause determination by a judge is not sufficient to remove allegedly obscene materials from circulation. *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989); *Heller v. New York*, 413 U.S. 483 (1973); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). The Court has held that wholesale seizures of speech materials constitute an unlawful prior restraint. *Fort Wayne Books*, 489 U.S. 46; *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Alexander v. United States*, 509 U.S. 544, 577 (1993) (Kennedy, J. dissenting).

In this case, the City has consistently refused or been unable to provide any guidance as to the meaning of these terms. Jon Payne, Senior Planning and Zoning Official for the City of Littleton, who had worked for the City since 1975, was completely unable to define the terms "substantial and significant" in the definition of adult bookstore. (R., at 460-461) Denise Naegle, Director of Community Development, defined the terms "substantial and significant" to mean "an important use in the business." (R., at 464) She could not place any percentage or number on this term. (R., at 464) Ms. Naegle "couldn't say" what percentage would not be a significant or substantial portion of its stock-in-trade or interior floor space and that "it would depend" on factors she was unable to articulate. (R, at p. 467, l. 9-24) However, based upon her interpretation she believed Z.J.'s business to be an adult entertainment establishment. (R., at 464)

However, in an area unrelated to controversial speech, Littleton has found a way to define the term "substantial" where cost "equals or exceeds 50%" in the context of describing damage or improvement to property in its flood plain and vested rights ordinances. *See*, L.M.C., Sections 10-6-2, 10-13-4. (Resp. Br. App., at 13-14)

In the opinion below, the Tenth Circuit suggested that a percentage figure would be a way to avoid vagueness issues. (Pet. App., at 13-14) Indeed, one of the *Amici* supporting the City in this case, the American Planning Association, produced a publication that actually makes a recommendation of a percentage figure that should be adopted by municipalities in establishing zoning

regulations for adult businesses.[8] The APA's well researched report recommended that the terms "substantial" and "significant" be quantified at 40 percent for floor space or inventory of a business in the definition of adult business.[9] (Resp. Br. App., at 15-16)

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[8] "*Amicus* American Planning Association (APA) is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning – including physical, economic, and social planning – at the local, regional, state and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society. The APA represents more than 30,000 professional planners, commissioners, and citizens involved with urban and planning issues." Brief of *Amici* National League of Cities, et al., "Interest of the *Amici Curiae*," p. 1.

Jon Payne, Planning Director from 1975-1995 and currently Littleton Senior Planner, testified he used the Planning Advisory Service of the American Planning Association as a research source. (R., p. 207, depo. p. 4, l. 23-24; R, p. 208, depo. p. 20, l. 17-23).

[9] The recommendation states, *"Quantify the terms 'a preponderance,' 'substantial,' or 'significant.'* Terms 'a preponderance,' 'substantial,' or 'significant' are open to interpretation. To use them in defining adult uses is to invite legal challenge. What is significant to the citizens of one community and their lawmakers may be 'insignificant' to others – most importantly, a court. . . . Therefore we, recommend a dual threshold for identification of sex businesses – inventory and floor area. In this report, we have used a measure of 40 percent of inventory items and 40 percent of floor area open to the general; stores exceeding either of those thresholds as regards the presence of sexually oriented materials are treated as sex businesses. . . ."

Kelly and Cooper, *"everything you always wanted to know about regulating sex businesses,"* APA Planning Advisory Service, Report Number 495/496, December 2000, pp. 156-157. (emphasis in original) (the full text of this recommendation is attached to this Brief at App. 15-16) The recommendation went on to discuss the merits of defining these terms at 30% or 50%.

Thus, under the American Planning Association's own recommendation, the Littleton ordinance is subject to interpretation. Contrary to the testimony of city officials, the definition of the terms "substantial" and "significant" are not only subject to an objective definition by a percentage, but this is the recommended approach according to the publication of the City's *amicus*, the APA.

The terms defining adult entertainment establishment "tell very little" to licensing officials or anyone who wishes to operate a bookstore in Littleton on how to comply with the licensing ordinance. Z.J. has always contended it does not seek to be an "adult bookstore, adult novelty store or adult video store," and, in fact, is not such a business subject to the licensing requirement. It has reduced its inventory to attempt to comply with the City's mysterious standard. (Plaintiff-Appellant's Supplemental Brief, Tenth Circuit, Exhibit C, p. 64, l. 3-4)

The City asserts that all prior restraint cases addressing overbroad discretion only relate to the grounds for granting or denying a license to present protected expression, and not to "the determination of whether a regulation *applies* to a particular business." (Pet. Br. App., at 28a, emphasis in original) However, this distinction has no substance. This Court has demonstrated it will "look through forms to the substance to recognize that informal censorship may sufficiently inhibit the circulation of publications" to constitute a prior restraint. *Bantam Books v. Sullivan*, 372 U.S., at 67. Here, the dangers of delay suppressing expression are, in fact, more pronounced because the discretionary decision of the city official that a license is required or not is essentially unreviewable since there is not even a denial to appeal.

This Court, in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, at 130-131 (1992), explained the dangers of allowing broad discretion to licensing officials.

> A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S., at 150-151. See also *Niemotko [v. Maryland]*, 340 U.S. 268, at 271 (1951). The reasoning is simple: If the permit scheme "involves the appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940), by the licensing authority, "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great" to be permitted. *Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975).

The determination of whether Z.J. devotes a substantial or significant amount of its stock-in-trade or floor space to adult materials "involves the appraisal of facts, the exercise of judgment, and the formation of an opinion." *Id.* The testimony of Denise Naegle makes this clear:

> Q. What percentage would not be a significant or substantial portion of its stock in trade or interior floor space?
>
> A. I couldn't say. It would depend.

Q. What would it depend on?

A. You know, I am not certain. I would have to think about it and do some research. I would probably want to know volume of sales and things like that. But I don't know. I can't say for certain.

(R., at p. 467, l. 9-17)

The deposition testimony of Jon Payne is even less illuminating. (R., at p. 460, l. 20 – p. 461, l. 2)

Given this testimony from the city officials making decisions on whether a license is required, the danger of suppression of unpopular speech is great, and anything but "vanishingly slight" as asserted by the *Amici* Ohio. (Br. of Ohio, p. 13)

The Court has consistently required that objective standards control licensing decisions so that the process is transparent and can be effectively reviewed by a court.

> "Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable expression."

City of Lakewood, 486 U.S. at 758.

Here, the Littleton definitions provide no guideposts, nor do city officials even attempt to offer any guideposts to assist a business seeking to comply with the ordinance or

to a court reviewing licensing decisions to determine if the licensor is suppressing a particular point of view. This case offers a clear example of how a supposedly "content neutral" licensing ordinance may be used as a means to suppress disfavored speech and the wisdom of the essential *Freedman* safeguards of prompt action by decisionmakers and reviewing courts. The challenged Littleton adult entertainment establishment licensing ordinance fails to provide the proper safeguards to ensure speech is not irretrievably lost.

The City asserts in its Brief, p. 27-28, that Z.J. never previously raised the issue of overbroad discretion in this case. This is simply incorrect. Z.J. brought a broad challenge to a very lengthy ordinance (Pet. Br. App., at 12a-42a) that challenged the Littleton adult entertainment establishment ordinance's zoning, licensing, civil disability, age restrictions, and other provisions on numerous grounds. The issue of improper discretion in the licensing law and vagueness in the zoning law were issues litigated in the district court and the Tenth Circuit. Overbroad discretion and the vagueness of definitions was raised in the complaint (R., at pp. 13-19) and in the cross-motion for summary judgment (R., at pp. 395-397, 411-419), as well as the appellate briefs. (Opening Brief of Plaintiff-Appellant, pp. 26-28, 44-53) The problems inherent in the definitional terms were part of the argument on overbroad discretion in licensing decisions.[10] The City's assertion that this argument was not raised is not supported by the record.

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[10] "It is Plaintiff's position that the challenged licensing scheme violates the First and Fourteenth Amendments because the licensing official has impermissibly broad discretion to grant, deny, suspend or

(Continued on following page)

III. UNLIKE THE CONTENT NEUTRAL ORDINANCE UPHELD IN *THOMAS v. CHICAGO PARK DISTRICT*, 534 U.S. 316 (2002), THE LITTLETON ORDINANCE TARGETS BUSINESSES ON THE BASIS OF THE CONTENT OF THE SPEECH PURVEYED

The City repeatedly asserts that the licensing ordinance in this case should be evaluated as a content neutral time, place and manner restriction and goes so far as to say this is "well settled." (Pet. Br. App., at 31a) However, the Court in *FW/PBS* specifically declined to rule on this issue because it had invalidated the Dallas licensing ordinance under a prior restraint analysis.[11]

Contrary to the assertions of the City, the Littleton ordinance, imposing additional requirements (including but not limited to licensing) on businesses disseminating sexually explicit publications and films, by its own terms, necessarily regulates a business on the basis of the content of the speech it presents. The City's repeated invocation of the term "content neutral" overlooks the Court's two most recent pronouncements on this issue.

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revoke a license to operate an adult entertainment establishment. Moreover, the impermissibly broad discretion vested in the City Clerk is exacerbated by the broad language in the licensing Ordinance, which fails to provide ascertainable standards for application and enforcement of the Ordinance." (Z.J. Brief in Support of Motion for Partial Summary Judgment, p. 23) (R., at 395)

[11] "Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented business." *FW/PBS*, 493 U.S., at 223 (O'Connor, J., plurality op.).

In the unanimous opinion in *Thomas v. Chicago Park District*, 534 U.S. 316, 322, and n. 2, the Court distinguished the ordinance struck down in *FW/PBS* from "a content neutral permit scheme regulating speech in a public forum" since "it involved a licensing scheme that targets businesses purveying sexually explicit speech." *Id.* *See also, City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) (*Thomas* "suggest[ed] that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral.").

In *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, both Justice Kennedy's opinion concurring in the judgment and Justice Souter's dissenting opinion discussed the concept of "content neutrality" in some detail. Justice Kennedy's opinion initially noted "that the designation ["content neutral"] is imprecise," *Id.*, at 444-445. Later, the opinion stated more explicitly, "[t]hese [adult use zoning] ordinances are content based and we should call them so." *Id.*, at 448. Nevertheless, this opinion endorsed the use of intermediate scrutiny for content based land use regulations where "negative externalities are diminished but speech is not." *Id.*, at 446.

> [Zoning regulations] do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a *prima facie* legitimate purpose: to limit externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built in legitimate

> rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional.

Id., at 449.

Justice Souter's dissenting opinion recognized that an adult business "is clearly burdened only if its expressive products have adult content." Such adult zoning regulations "occupy a kind of limbo between full blown, content based restrictions and regulations that apply without any reference to the substance of what is said." *Id.*, at 457. "A restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove." *Id.* The capacity of zoning regulation to address the adverse external secondary effects of adult uses without eliminating speech is "the only possible excuse for speaking of secondary–effects zoning as akin to time, place or manner regulations." *Id.*

That excuse does not exist with regard to the Littleton ordinance that imposes a licensing requirement on adult businesses, in addition to a strict zoning restriction that limits such businesses to locations to maximum possible area of 78 acres, less than 1% of the Littleton's total area, as determined by the Tenth Circuit. (Pet. App., at 36-37) Like the ordinance struck down in *FW/PBS*, the Littleton licensing ordinance can be distinguished from content neutral licensing laws because it "targets businesses purveying sexually explicit speech." *Thomas*, 534 U.S., at 322, n. 2. As such, the City's pleas that the licensing ordinance be evaluated as a content neutral time, place and manner restriction under an intermediate level of scrutiny should be rejected.

Finally, the City contends that the ordinance should be considered content neutral because it is "narrowly tailored to affect only the category of theaters shown to produce the unwanted secondary effects" as required by *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, at 52 (1986) This argument is contradicted by the inability of city officials to articulate coherently a basis for determining which types of businesses are regulated and which are not subject to the licensing requirement, *See* discussion *supra.* In fact, Z.J. does not provide viewing of films or live entertainment on the premises. *See, Encore Videos, Inc. v. City of San Antonio*, 352 F.3d 938 (5th Cir. 1993), *clarifying prev. op.*, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, ___ U.S. ___, 124 S.Ct. 466 (2003) (application of adult zoning ordinance to video store "found not to be narrowly tailored because of both its failure to make an on-site/off-site distinction and its low 20% inventory requirement.") The broad sweep of the encompassing definitions of adult businesses, confirmed by the testimony of city officials, indicates the Littleton ordinance is not narrowly tailored.

The challenged ordinance requires prior approval before expression can occur. Wrongful denial or any delay in the issuance of a license by city officials results in the prohibition of certain types of expression in the City of Littleton. As such, the only appropriate analytical framework with regard to the issue before the Court is under a prior restraint analysis.

IV. THE CITY INCORRECTLY ASSERTS THAT IT IS "UNWORKABLE" TO PROVIDE THE CONSTITUTIONALLY REQUIRED SAFEGUARDS TO PROTECT EXPRESSION

The City argues that it is "unwor[illegible]able" to guarantee a prompt judicial determination and that applying this essential *Freedman* safeguard will cause a sea change in the law. The City apparently is not as creative in protecting speech as it is restricting speech to limit the alleged adverse secondary effects of unpopular speech. Indeed, the City's *amici* suggest provisional licenses or time periods for prompt judicial determination as methods to provide for prompt judicial determination. As demonstrated by the fact that several circuits have required prompt judicial determination, many jurisdictions have dealt with the issue of prompt judicial review by enacting statutes or providing for provisional licenses. Neither the City nor *amici* provide any concrete examples of problems caused by compliance with the essential safeguard of prompt judicial review.

The State of California has enacted a statute that specifically deals with the issue of prompt judicial determination. Cal. Code of Civil Procedure, Section 1094.8 ("Permit proceedings affecting expressive conduct; expedited judicial review") (*See* Response to Appellee's Petition for Rehearing En Banc filed in the Tenth Circuit by Z.J., Exhibit A.) *See also*, Tenn. Code Ann. Section 7-51-1110(d) (providing for prompt review); and *Baby Tam v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) (Nevada Revised Statutes and local court rules amended to provide for prompt judicial determination of prior restraint claims). Aurora, Colorado has enacted an ordinance to expressly address prompt judicial determination in light of the

Tenth Circuit's decision in this case. *See*, Aurora Municipal Code Section 86-55(d). (Response to Appellee's Petition for Rehearing En Banc filed in the Tenth Circuit by Z.J., Exhibit B)

Thus, contrary to the protests of the City, it is *not* impossible, or even particularly difficult to meet constitutional requirements to protect against the suppression of expression. That is not a proper reason to diminish First Amendment protection. As stated by the Court, "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S., at 295.

Moreover, the Tenth Circuit upheld many provisions of the Littleton ordinances that address the adverse secondary effects of adult entertainment establishments. The most important of these is the locational restriction that banishes such businesses to less than 1% of the total land area of Littleton within limited areas in industrial zoned areas. Even without a licensing requirement, the City of Littleton has numerous tools with which to regulate these businesses. The City can also enforce laws of general application against any business, including bookstores, selling any type of material, and obtain a closure in the case of violations of Littleton health and safety regulations.

In addition, the City remains free to enforce any criminal laws in the event that actual crimes occur in or around such businesses, and close such businesses if they constitute a public nuisance. *See*, *Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986). "If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived

secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.* 478 U.S. at 708 (O'Connor, J. concurring).

This Court in *Freedman* and *FW/PBS* imposed important requirements upon municipalities attempting to regulate businesses engaged in certain types of speech through the use of licenses. The City is now trying to neutralize the essential second *Freedman* safeguard requiring prompt judicial determination to apparently assist it in combating the adverse external secondary effects of adult entertainment establishments. The City has apparently chosen not to enforce laws applicable to all businesses in favor of a licensing scheme targeting businesses distributing adult materials. However, "[t]he 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." *United States v. Playboy Enterprises Group*, 529 U.S. 803, at 830 (2000) (Thomas, J. concurring), *citing Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J. concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.")

These requirements should not be brushed aside because it is inconvenient for the government to comply with the constitutional requirement of ensuring that protected speech is not erroneously restrained. The Tenth

Circuit's decision in this case faithfully applies the decisions of this Court and protects the rights guaranteed to all citizens by the First and Fourteenth Amendments to the United States Constitution. The Tenth Circuit decision should be affirmed.

CONCLUSION

Based upon the foregoing arguments and authorities, Respondent Z.J. Gifts respectfully requests the Court affirm the decision of the United States Court of Appeals for the Tenth Circuit holding that the prompt judicial review requirement of *Freedman* and *FW/PBS* entails prompt judicial determination, and not merely a prompt commencement of judicial proceedings.

Dated: January 26, 2004

Respectfully submitted,

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DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County District Court 7325 S. Potomac Street Englewood, Colorado 80112	
Plaintiff: CITY OF LITTLETON Defendant: Z.J. GIFTS D-4, LLC, a Colorado Limited, Liability Company d/b/a CHRISTAL'S	•COURT USE ONLY• Case Number: 00CV162 Div.: 3 Ctrm:
ORDER	

THIS MATTER, having come on to be heard on Defendant's Motion for a Stay Pending Appeal pursuant to C.R.C.P. 62(d) and C.A.R. 8(a).

THE COURT having reviewed Defendant's Motion, the City's Response and hearing Oral Argument on December 14, 2001,

DOTH ORDER that the Defendant's Motion for a Stay Pending Appeal be denied.

DATED this 27th day of December, 2001 nunc pro tunc to the 14th day of December, 2001.

BY THE COURT

/s/ Thomas C. Levi
Thomas C. Levi
District Court Judge

COLORADO COURT OF APPEALS

Court of Appeals No. 01CA2319
Arapahoe County District Court No. 00CV0162
Honorable Thomas C. Levi, Judge

City of Littleton,

Plaintiff-Appellee,

v.

Z.J. Gifts, D-4 LLC,

Defendant-Appellant.

ORDER AND JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE ROTHENBERG
Kapelke and Dailey, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
February 20, 2003

Larry W. Berkowitz, City Attorney, Brad D. Bailey, Assistant City Attorney, Littleton, Colorado, for Plaintiff-Appellee

Schwartz & Goldberg, P.C., Arthur M. Schwartz, Michael W. Gross, Denver, Colorado, for Defendant-Appellant

In this action to enforce a municipal zoning and adult business licensing ordinance, defendant, ZJ Gifts, D-4 LLC, doing business as Christal's, appeals the trial court's judgment in favor of plaintiff, City of Littleton, and the

corresponding injunction order. We reverse and remand for further proceedings.

I. Background

A. Federal Court Action

In 1999, before this action was filed, ZJ Gifts initiated an action in the federal district court seeking declaratory relief and damages against the City. ZJ Gifts challenged the constitutionality of the Littleton City Code adult business regulations based on alleged violations of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution, and article II, sections 3, 10, and 25 of the Colorado Constitution.

In March 2001, the federal district court issued an order declaring Littleton's adult business regulation ordinance constitutional in its entirety, granting the City's motion for summary judgment, and dismissing the case. *Z.J. Gifts D-4, L.L.C. v. City of Littleton,* (D. Colo. No. 99-N-1696, Mar. 31, 2001) *(ZJ Gifts I).*

In November 2002, the United States Court of Appeals for the Tenth Circuit affirmed the district court judgment in part and reversed it in part. The federal appellate court upheld the federal district court's ruling as to the constitutionality of the location and zoning provisions of the Littleton ordinance, but reversed the ruling regarding the constitutionality of certain other provisions. *Z.J. Gifts D-4, L.L.C. v. City of Littleton,* 311 F.3d 1220 (10th Cir. 2002) (*ZJ Gifts II*).

The federal appellate court concluded: (1) ZJ Gifts had no standing to challenge the ordinance on vagueness grounds; (2) ZJ Gifts had standing to challenge the

application procedure, location requirements, and judicial review procedure; (3) the ordinance constituted a prior restraint; (4) the ordinance's requirements that zoning officials provide a letter to accompany an adult business license application and that the police department fingerprint and photograph the applicant were unconstitutional because they did not specify a time within which these government officials must act; (5) the ordinance's judicial review procedure was unconstitutional because it failed to provide for prompt judicial review; and (6) the constitutionally infirm provisions were severable from the remainder of the licensing scheme. *ZJ Gifts II*.

Both ZJ Gifts and the City petitioned for rehearing, which was denied.

B. State Court Action

In January 2000, while the federal action was still pending, the City filed this action for damages and an injunction to enjoin ZJ Gifts from operating its business "in a manner inconsistent with the provisions of the Littleton City Code." The City alleged that ZJ Gifts was an adult business operating outside of the permitted zoning district, within five hundred feet of a church or day care center, and without the licenses required for a retail and adult business.

In its answer, ZJ Gifts admitted that its store was located in a zone that prohibited adult businesses, but denied that it operated an adult business. ZJ Gifts also contended the provisions of the Littleton adult business regulations were unconstitutionally vague, overbroad, and violative of the First and Fourteenth Amendments to the United States Constitution, and article II, section 10 of the

Colorado Constitution. ZJ Gifts did not challenge the constitutionality of the general retail licensing provision.

The parties filed cross-motions for summary judgment and briefed the issues. However, before the trial court had ruled, the City filed a second motion for summary judgment, asserting that the issues had been decided adversely to ZJ Gifts by the federal district court and that collateral estoppel now barred relitigation of the issues in this case.

In August 2001, the trial court granted the City's second motion for summary judgment and enjoined ZJ Gifts from operating its business in violation of the Littleton City Code.

II. Standard of Review

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78 (Colo. 1999).

In determining whether summary judgment is proper, the court must give the nonmoving party the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. All doubts must be resolved against the moving party. *Pham v. State Farm Mut. Auto. Ins. Co.*, ___ P.3d ___ (Colo. App. No. 01CA1965, Jan. 2, 2003).

We review an order granting summary judgment de novo. Where the material facts in a case are not in dispute, we can resolve an appeal as a matter of law. *Pham v. State Farm Mut. Auto. Ins. Co., supra.*

III. Collateral Estoppel

ZJ Gifts contends the trial court erred by granting summary judgment in favor of the City based on the doctrine of collateral estoppel. ZJ Gifts maintains that collateral estoppel should not have applied because the federal district court order was subject to de novo review and therefore not final. We conclude the issue before us is now moot because the ruling of the federal appellate court is now final.

A.

Before we address the merits of ZJ Gift's collateral estoppel argument, we first reject the City's contention that the invited error doctrine precludes ZJ Gifts' appeal. According to the City, ZJ Gifts failed to raise in the trial court the argument it makes on appeal, namely, that for the purposes of collateral estoppel, a decision that must be reviewed de novo is not final pending appeal. We disagree that the invited error doctrine applies.

The invited error doctrine provides that a party who has injected error into the case may not later complain on appeal. *Hansen v. State Farm Mut. Auto. Ins. Co.,* 957 P.2d 1380 (Colo. 1998) (party who actively participated in the jury instruction conference, but chose not to redraft an instruction to comport with the law, was precluded from appealing based on an erroneous instruction).

Contrary to the City's contention, the circumstances in *Morgan County Department of Social Services v. J.A.C.,* 791 P.2d 1157 (Colo. App. 1989), are distinguishable. There, the respondent's counsel agreed to the manner in which peremptory challenges would be allocated, but later changed his position. After the jury returned its verdict,

respondent's counsel moved for a new trial, alleging an unlawful peremptory challenge allocation. For the first time, he cited legal authority supporting his position.

The trial court denied the motion for a new trial, after finding counsel "knew of but did not cite" the legal authority that would have allowed the court to avoid error. That ruling was upheld on appeal after counsel admitted at oral argument that he was aware of the legal authority when he made his objection, but failed to inform the trial court. *Morgan County Dep't of Soc. Servs. v. J.A.C., supra,* 791 P.2d at 1159.

Unlike the circumstances in J.A.C., the record here contains no indication that counsel for ZJ Gifts was aware of, but failed to cite, legal authority regarding the finality of a summary judgment pending appeal.

We therefore reject the City's argument that the failure of ZJ Gifts' counsel to argue this point of law in response to the City's motion for summary judgment injected error into the proceedings.

B.

The doctrine of collateral estoppel provides that a court's final decision on an issue actually litigated and decided is conclusive of that issue in any subsequent suite. The doctrine protects litigants from the burden of relitigating the same issue and promotes judicial economy by preventing needless litigation. *Carpenter v. Young,* 773 P.2d 561 (Colo. 1989).

Collateral estoppel has four requirements. Only the fourth requirement of finality is at issue in this case.

The first requirement is that the issue precluded must be identical to an issue actually determined in a prior proceeding. The second is that the party against whom estoppel is asserted must have been a party to the prior proceeding. The third is that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Bebo Constr. Co. v. Mattox & O'Brien, P.C., supra; Quist v. Specialties Supply Co.,* 12 P.3d 863 (Colo. App. 2000).

The fourth requirement is that there must be a final judgment on the merits in the prior proceeding. *Bebo Constr. Co. v. Mattox & O'Brien, P.C., supra.* The judgment must be "sufficiently firm" such that it was not tentative, the parties had an opportunity to be heard, and there was an opportunity for review. *Carpenter v. Young, supra,* 773 P.2d at 568.

While an issue decided on a motion for summary judgment may bar relitigation of that issue based on collateral estoppel principles, *Bebo Constr. Co. v. Mattox & O'Brien, P.C., supra,* the pendency of a de novo review proceeding suspends the operation of an otherwise final judgment. *See Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1,* 732 P.2d 616 (Colo. 1987); *Jefferson County Sch. Dist. No. R-1 v. Industrial Com'n,* 698 P.2d 1350 (Colo. App. 1984), *overruled on other grounds by Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1, supra; Miller v. Lunnon,* 703 P.2d 640 (Colo. App. 1985) (citing with approval Restatement (Second) of Judgments § 13 cmt. f (1982), that a judgment otherwise final remains so despite the taking of an appeal unless the appeal is actually a review de novo).

C.

Here, in its second motion for summary judgment, the City maintained that all disputed issues in the state court action had been decided by the federal district court. The trial court agreed, and based on the City's submissions from the federal district court case, the court granted the City's motion for summary judgment.

However, at the time the trial court did so, ZJ Gifts had appealed the summary judgment entered by the federal district court, and the federal appellate court had not yet ruled. Accordingly, the federal district court's summary judgment did not meet the finality requirement of collateral estoppel, *see Carpenter v. Young, supra,* and the trial court here erred in concluding collateral estoppel applied.

However, during oral argument before this court, both sides agreed that the federal appellate court has now completed its review of the prior judgment and has denied the parties' respective petitions for rehearing. To the extent that material facts are not in dispute, we are arguably in the same position as the trial court to resolve the issues in the City's motion for summary judgment. *See Pham v. State Farm Mut. Auto. Ins. Co., supra.*

Nevertheless, we conclude the merits of the underlying issues should be decided by the trial court on remand. The federal appellate court affirmed in part and reversed in part the federal district court's judgment, and ZJ Gifts also maintains that the issues decided in the federal proceeding were not identical to those in the state proceeding. The parties do not appear to have litigated in the federal proceeding the City's claim for relief based on ZJ Gifts' alleged violation of the Littleton sales tax license

requirement. And, beyond acknowledging the fact that ZJ Gifts did not possess a sales tax license, the federal district court did not enter any findings of fact or conclusions of law regarding the sales tax license requirement relevant to the disposition of the issue here. There was no relevant discussion of that issue on appeal. *See ZJ Gifts I; see also ZJ Gifts II.*

Further, the parties have not briefed the underlying issues on appeal, which is significant in light of the number of recent opinions issued nationwide that may bear on the issues, and the City also has amended certain provisions of the ordinance.

We therefore reverse the order granting summary judgment and remand the case to the trial court to resolve these issues.

IV. Injunction

However, we address ZJ Gifts' contention that the trial court's injunction is unenforceable because it is vague and does not conform to the specificity requirement of C.R.C.P. 65(d). We agree.

C.R.C.P. 65(d) provides that every order granting an injunction "shall set forth the reasons for its issuance; shall be specific in its terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

A trial court has broad discretion to formulate the terms of injunctive relief when equity so requires. *Colo. Springs Bd. of Realtors, Inc. v. State,* 780 P.2d 494 (Colo. 1989). However, an injunction prohibiting conduct must be sufficiently precise to enable the party subject to it to

conform its conduct to the requirements thereof. *Colo. Springs Bd. of Realtors, Inc. v. State, supra,* 780 P.2d at 499 (holding injunction vague and remanding to modify injunction to inform enjoined party of the "steps it must take to avoid violations thereof").

When interpreting a state procedural rule, we make look to the similar federal rule and related case law for guidance. *Allen v. Am. Family Mut. Ins. Co.,* ___ P.3d ___ (Colo. App. No. 01CA0317, Sept. 26, 2002).

One purpose of Fed. R. Civ. P. 65 is to ensure that those against whom an injunction is issued receive fair and precisely drawn notice of what the injunction actually prohibits. Fed. R. Civ. P. 65 is also intended to avoid contempt citations based on an order that is too broad or vague. *United States v. Louisiana-Pacific Corp.,* 682 F. Supp. 1141 (D. Colo. 1988).

An order requiring a party to obey the law in the future is too broad under Fed. R. Civ. P. 65, as is an order enjoining a party from further violations of a particular law, because such orders fail to meet the specificity requirements of the rule. *United States v. Louisiana-Pacific Corp., supra.*

Here, the injunctive order of the trial court reads in full: "This court further orders that the Defendant be enjoined from operating its business in violation of the Littleton City Code." The order does not set forth the reasons for its issuance and does not describe the acts or acts from which ZJ Gifts is restrained. Also, there are no findings regarding the provisions, if any, of the Littleton City Code that ZJ Gifts violated.

Because the order's language does not provide fair and precisely drawn notice of what it prohibits, we conclude it does not meet the requirements of C.R.C.P. 65(d).

The order and judgment are reversed, and the case is remanded for further proceedings in accordance with the views expressed in this opinion.

JUDGE KAPELKE and JUDGE DAILEY concur.

Littleton Municipal code

Chapter 6, Flood Plain Regulations

10-6-2: DEFINITIONS:

Unless specifically defined below or elsewhere in this Code, words or phrases used in these regulations shall be interpreted to have the same meaning as in common usage, and to provide reasonable application of these regulations.

SUBSTANTIAL DAMAGE: Damage, of any origin, sustained by a structure which results in costs to restore the structure to its origin [sic] condition that equal or exceed fifty percent (50%) of the market value of the structure before the damage occurred.

SUBSTANTIAL IMPROVEMENT: Any repair, reconstruction, or improvement to a structure, the cost of which equals or exceeds fifty percent (50%) of the market value of the structure either: a) before the improvement or repair is started; or b) if the structure has been damaged and is being restored, before the damage occurred. For the purpose of this definition, "substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor, or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure. "Substantial improvement" does not include either: 1) any construction necessary to comply with existing state or local health, sanitary, or safety code specifications which are solely necessary to assure safe living conditions, or 2) any alteration of any officially designated historic structure.

Littleton Municipal code

Chapter 13, Vested Property Rights

10-13-4: DEFINITIONS:

All words used in this Chapter, except where specifically defined herein, shall carry their customary meanings when not inconsistent with the context. Definitions contained elsewhere in this City Code shall apply to this Chapter unless modified hereinbelow.

SUBSTANTIAL IMPROVEMENT: Any repair, reconstruction, redevelopment, improvement or addition to an existing structure (or structures), the cost of which equals or exceeds fifty percent (50%) of the actual value (County Assessor's calculations) of said structure either: a) before the improvement is started; or b) if the structure has been damaged and is being restored, before the damage occurred.

Excerpt from Kelly and Cooper, "everything you always wanted to know about regulating sex businesses", American Planning Association, Planning Advisory Service, Report Number 495/496, December 2000, Chapter 9, Recommendations, pp. 156-157.

RETAIL BUSINESSES

Quantify the terms "a preponderance," "substantial," or "significant." The terms "a preponderance," "substantial" or "significant" are open to interpretation. To use them in defining adult uses is to invite legal challenge. What is "significant" to the citizens of one community and their lawmakers may be "insignificant" to others – most importantly, a court. The retail value of the materials in stock might be the best measure as to whether a business was really a sex business, but most local governments are not equipped to do full retail inventory audits. Therefore, we recommend a dual threshold for identification of sex businesses – inventory and floor area. In this report, we have used a measure of 40 percent of inventory items and 40 percent of floor area open to the general public; stores exceeding *either* of those thresholds as regards the presence of sexually oriented materials are treated as sex businesses. The exact percentage can vary and need not be the same percentage for floor area as for inventory. The important message is the use of the percentage and the use of two different measures, making it more difficult for a business that specializes in sex to be classified as a business that does not.

Some local governments might effectively use 30 percent as the threshold. We think that using a threshold of less than 30 percent leaves the community open to the

argument that the amount of area or inventory devoted to sexually oriented materials is not "significant." Likewise, we would not recommend the use of 50 percent because there is too much room for error on either side of that mark to make it perfectly clear whether a business is or is not a business dealing primarily in sexually oriented materials.

No. 02-1609

Supreme Court, U.S.
FILED
MAR 1 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE CITY OF LITTLETON,

Petitioner,

v.

ZJ GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The narrow issue in this case concerns the judicial review appropriate for objective license denials made for the specific reasons and on the brief, fixed timetable in the Littleton Ordinance. *See* LCC § 3-14-8 (Br. App. 28a-30a). The case is not, as ZJ and its *amici* would have it, about the various constitutional challenges that can be brought against an adult business ordinance at any time in state or federal court. Thus, ZJ's claim about having to obtain a license–a claim that can be (and was) brought irrespective of a denial–is misplaced. See Section I.B., *infra* (addressing ZJ's "substantial or significant" vagueness argument). ZJ's failed argument on content-neutrality is equally irrelevant to the question presented, which centers not on the level of scrutiny applicable to Littleton's regulations, but on the review procedure appropriate for license denials under LCC § 3-14-8(A). See Section I.C., *infra*. Despite ZJ's and its *amici*'s constant focus on judicial review of *constitutional* questions, ministerial denials under LCC § 3-14-8(A) do not "involve the licensor in any decision-making of constitutional proportion." *Graff v. City of Chicago*, 9 F.3d 1309, 1331 (7th Cir. 1993) (en banc) (Flaum, J., concurring in judgment).

Rather, as the Court's cases demonstrate–from *Cox v. New Hampshire*, 312 U.S. 569 (1941), to *Freedman v. Maryland*, 380 U.S. 51 (1965), to *FW/PBS v. Dallas*, 493 U.S. 215 (1990), to *Thomas v. Chicago Park District*, 534 U.S. 316 (2002)–the central inquiry in this case is: (1) whether unbridled discretion exists in the timetable or grounds for denying a license, and (2) what judicial review is appropriate for that decision. The unifying theme of the Court's cases is that these two items are inextricably intertwined: the nature of judicial review required turns on the nature of the governmental decision under review. Thus, the critical fact in this case–as to which the parties and their *amici* agree–is that objective standards govern Littleton's time-limited decision to grant or deny a license, and none of those standards "has anything to do with what a speaker might say." *Thomas*, 534 U.S. at 322.

ZJ concedes this issue, but then ignores that *Freedman*'s prompt judicial determination requirement was specifically grounded in the content-based nature of the censor's decision and the concomitant risk of a "possibly erroneous denial of a license." *Freedman*, 380 U.S. at 59. Where, as here, none of the grounds for denying a license has anything to do with speech, ZJ's claimed risk of a wrongful denial is hyperbole concerning the City's inherent ability to abuse its power–in the words of the panel below, to "overstep the [non-discretionary] bounds of the ordinance." Pet. App. 31. This raw-abuse-of-power theory is as unsupported in the record as it is in the Court's cases. *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (holding that courts will not presume malfeasance of public officials).

Nor has ZJ proffered a reason why immediate access to meaningful judicial review of a ministerial denial will not effectively safeguard its rights, especially where the review allows for expedited resolution and the Colorado Supreme Court has held that any wrongful denial–which would be obvious under the Ordinance's clear standards–will be "remedied promptly by judicial intervention." *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 284 (Colo. 1995).

ARGUMENT

I. Prompt Commencement of Judicial Review of A License Denial Made Under Narrow, Objective Standards Satisfies the First Amendment.

A. ZJ Concedes That The Two Rationales Undergirding *Freedman*'s Prompt Judicial Determination Requirement Do Not Apply to Littleton's Speech-Neutral Decisions to Grant or Deny a License.

ZJ does not answer the City's argument, Pet. Brf. 18-26, that the prompt judicial determination requirement stems directly from the judicial expertise necessary to draw "the line between legitimate and illegitimate

speech," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), and the threat of self-censorship based on the "discouraging effect" of the censor's decision "that the film is unprotected." *Freedman*, 380 U.S. at 59. Noting these concerns, the *Freedman* Court stated: "*Therefore*, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* (emphasis supplied). In this case, ZJ concedes that such concerns are not present because Littleton's "criteria for granting a license have been held to provide objective standards." Resp. Brf. 32.

Nor does ZJ deny that the *FW/PBS* plurality dealt squarely with both the judicial expertise and self-censorship concerns, *see* Pet. Brf. 22-26, and explicitly held that ministerial licensing "does not present the grave 'dangers of a censorship system.'" *FW/PBS*, 493 U.S. at 228 (quoting *Freedman*, 380 U.S. at 58). The plurality thus concluded that the city does not "bear the burden of going to court to effect the denial of a license" or "bear the burden of proof once in court." *FW/PBS*, 493 U.S. at 230 (plurality opinion); *see also id.* at 244-48 (White, J., concurring in part and dissenting in part); *id.* at 250 (Scalia, J., concurring in part and dissenting in part). The plurality, recognizing that the judicial deadline requirement rests on essentially the same premise as the requirement that the government bear the burden of initiating judicial proceedings, concluded that the First Amendment requires only that the government ensure the "availability" of "prompt judicial *review*," *id.* at 230, of ministerial decisions, rather than, as was required in *Freedman*, a "prompt judicial *determination*." 380 U.S. at 60.

In both *FW/PBS* and *Freedman*, the contours of the judicial review safeguard were animated by the relative risks that "the license [will be] erroneously denied." *FW/PBS*, 493 U.S. at 228; *Freedman*, 380 U.S. at 59. The *FW/PBS* Court recognized that ministerial licensing decisions, which are "not presumptively invalid," *FW/PBS*, 493 U.S. at 229, present a qualitatively different, and significantly lesser, risk of erroneous denial than do

censorship schemes. *Id.* at 228. ZJ now seeks to analytically divorce the judicial review safeguards from the respective risks for which they are designed, or in the alternative, equate the risk of improperly drawing "the line between legitimate and illegitimate speech," *Southeastern Promotions*, 420 U.S. at 559, with an alleged risk that city officials will intentionally deny a license even when clear standards require that it be granted. Such an unsubstantiated risk of "highly speculative injuries," *FW/PBS*, 493 U.S. at 248 (White, J., concurring in part and dissenting in part), does not justify imposition of a judicial deadline safeguard properly characterized by the Court as "extraordinary." *Thomas*, 534 U.S. at 323.

The cases cited in ZJ's discourse on prior restraint, Resp. Brief. 14-24, only support the City's central proposition that unbridled discretion–not the mere procedure of licensing–is the *sine qua non* of prior restraint. In *Southeastern Promotions*, the Court catalogued its prior restraint cases and stated: "In each of the cited cases, the prior restraint *was embedded in the licensing system itself, operating without acceptable standards.*" *Southeastern Promotions*, 420 U.S. at 553 (emphasis supplied). Similarly, in *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951), the Court held that it is "*the lack of standards in the license-issuing 'practice' [which] renders that 'practice' a prior restraint.*" (emphasis supplied).

Thus, ZJ and its *amici* cannot claim that the mere existence of a licensing procedure makes Littleton's Ordinance a "prior restraint." This rhetorical assertion simply does not advance the analysis of the issues in this case. Labels are insufficient, as one Seventh Circuit judge has carefully observed:

> What distinguishes the Court's treatment of licensing schemes in these two sets of cases is the presence of unfettered discretion. In both *Cox* and *Clark* [*v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)], the Court dealt with the administration of an ordinance or regulation which proscribed the activity of the licensing authority. In fact, the *Cox* Court distinguished those

> cases in which government officials were unrestrained in their power to grant or deny permits. 312 U.S. at 577. In both *Lakewood* [*v. Plain Dealer Publishing*, 486 U.S. 750 (1988)] and *FW/PBS*, however, there was unfettered discretion to grant or deny a license–in *Lakewood* pursuant to the very language of the ordinance and in *FW/PBS* pursuant to the way the licensing official could delay the licensing decision, presumably indefinitely. . . . The concerns the Court voiced in both *Lakewood* and *FW/PBS* are not present here.

Graff, 9 F.3d at 1334-35 (Ripple, J., concurring).

Nor is there any merit in ZJ's claim that prompt access to an independent judicial officer to review a license denial is "meaningless" absent a mandated judicial deadline. Resp. Brf. 27. On the contrary, because Littleton's Ordinance provides objective standards, a quick exit from administrative proceedings, and a reviewable record that "allows courts quickly and easily to determine whether the licensor is discriminating against disfavored speech," *Lakewood*, 486 U.S. at 758, prompt judicial review is both "available" and meaningful.

A judicial deadline makes sense only if, as the Court has required in connection with censorship schemes, the judicial proceedings are initiated by the government and the private party is entitled to remain passive; the deadline then ensures that the government will expedite the review of its own presumptively-invalid decision. No such presumption of invalidity attaches to Littleton's objective decisions; indeed, absent unbridled discretion, the City is presumed to apply its ordinance properly, and the business, as plaintiff, can seek expedited review if it feels the City has not followed the objective standards of LCC § 3-14-8(A). But in this case, ZJ has proffered no evidence or legal argument to overcome that presumption.

ZJ's position is based on the erroneous assumption that *Freedman*'s judicial deadline requirement is driven by a need to control the courts. In fact, the deadline

requirement–like each of *Freedman*'s procedural requirements, *see* Pet. Brf. 20 n.11–responds to the central concern in the *Freedman* opinion, namely, that censors will be insufficiently concerned about First Amendment rights. Nothing in *Freedman* suggests that this Court lacks confidence in the ability of lower courts, including state courts, to adjudicate First Amendment claims. On the contrary, the basis of the *Freedman* approach is precisely that courts, not official censors, should make the inherently judicial decision "that [a] film is unprotected" by the First Amendment. *Id*. Such a concern is absent here.

Second, the argument ignores this Court's cases, in which normal judicial review has been deemed ineffective only for decisions infected with unbridled discretion: "[T]he absence of express standards makes it difficult [for courts] to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power . . . [r]ender[ing] the licensor's action in large measure effectively unreviewable." *Lakewood*, 486 U.S. at 758-59; *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) ("[The administrator] need not provide any explanation for his decision, and that decision is unreviewable").

On the other hand, judicial review of a license denial under LCC § 3-14-8(A) is meaningful, because Littleton's "[s]tandards provide the guideposts that check the licensor and *allow courts quickly and easily* to determine whether the licensor is discriminating against disfavored speech." *Lakewood*, 486 U.S. at 758 (emphasis supplied). LCC § 3-14-8(A) commits the City, ahead of time, to a limited list of reasons that can justify denial of an application. If an application satisfies these straightforward and easily-met criteria, the City will be unable to seize upon some extraneous fact and use that as a "*post hoc* rationalization," *id*., to justify a license denial. Thus, the Ordinance unquestionably gives a court a meaningful standard against which to judge the City's exercise of its limited discretion.

Indeed, lower courts–even those in circuits that do not require a firm judicial deadline–have insisted on a reviewable record as a condition of finding that meaningful judicial review has been provided to an adult business. *See, e.g., Annex Books v. City of Indianapolis*, 2003 U.S. Dist. Lexis 19878, at 5-6 (S.D. Ind. 2003) (following Seventh Circuit's decision in *Graff*, 9 F.3d 1309, and holding that "[o]ffering the right to request a hearing without including any of the procedural steps for exercising that right, including nothing regarding the creation of a reviewable record by a court, deprives the applicant of *meaningful* access to judicial review") (emphasis in original); *Pleasures II Adult Video v. City of Sarasota*, 833 So. 2d 185, 189 (Fla. Ct. App. 2002) (noting that because "certiorari is a record-based review procedure," a hearing is necessary for meaningful judicial review).

As the City has demonstrated, the analytical structure of *Thomas* fits the objective, time-limited[1] decisions under LCC § 3-14-8. *See* Pet. Brf. 33-36. Indeed, Littleton enjoys even less discretion than the Court has approved in *Thomas* and other licensing mechanisms for implementing time, place, and manner regulations. *Thomas*, 534 U.S. at 319 n.1 (allowing license denial if the activity is "inconsistent with the classifications and uses of the park" or if it "would present an unreasonable danger to the health or safety of the applicant, or other users of the park"). Similarly, the Court in *Cox*–upheld a state statute that prohibited any "parade or procession" on public streets without a license–ruling that the statute did not grant excessive discretion because the state supreme court required a license to be issued if "the convenience of the public in the

[1] ZJ mistakenly claims that a final administrative decision can take up to 90 days from the date of application. Resp. Brf. 28. ZJ's cites the current version of LCC § 3-14-8, but its time frames are incorrect. LCC § 3-14-8(C) ensures that the business will have its final administrative decision or a license within 40 days after application–2 days less than the time frame involved in *Thomas*. *Thomas*, 534 U.S. at 318-19.

use of the streets would not thereby be unduly disturbed." *Cox*, 312 U.S. at 576. In short, the standards upheld in *Cox* and in *Thomas* are far more discretionary than any in LCC § 3-14-8(A).

ZJ decries the time frames for proceeding under Colo.R.Civ.P. 106(a)(4), but this complaint stems from ZJ's continued conflation of decisionmaking of "constitutional proportion" with objective denials under LCC § 3-14-8(A). Judicial review for the latter situation is the only issue under review here because, as ZJ points out, judicial review of constitutional questions can be had any time.

Additionally, ZJ completely ignores the ability of the court to accelerate any action which in the discretion of the court requires acceleration. *Colorado Springs*, 896 P.2d at 284 (holding that Colo.R.Civ.P. 106(a)(4) makes prompt judicial review available by "establish[ing] procedures for both a stay of the effect of an adverse decision and expedited review thereof"). As a practical matter, unlike certiorari review of some fact-intensive, discretionary decisions (e.g., personnel appeals, rezoning requests, etc.) judicial review of a LCC § 3-14-8(A) denial would center on readily discernible facts (whether the applicant is 18, the corporation is in good standing, etc.) and improper denials would be obvious.

On expedited review, the business's simple complaint–setting forth the parties, the hearing officer's decision, and the claimed abuse of discretion–could be filed quickly, together with the necessary court order directing the City to submit the record shortly thereafter. Given the narrow grounds for a license denial, the record of the administrative hearing could be prepared within a few days, as could the City's essentially pro-forma answer denying an abuse of discretion. An accelerated briefing schedule, including simultaneous briefs or dispensing with briefs, could be easily accommodated because the crux of the matter is the objective fact that formed the basis of the denial.

Additionally, the applicant can seek interim relief pursuant to Colo.R.Civ.P. 65 to protect its rights pending final resolution. *City of Golden v. Simpson*, 2004 Colo.

Lexis 1, *25-26 (Colo. 2004). ZJ has presented no reason to conclude that the Colorado courts would not follow the Colorado Supreme Court's instruction that any unconstitutional restraint "be remedied promptly by judicial intervention." *Colorado Spring*, 896 P.2d at 284.

Moreover, an adult business that claims a denial is *unconstitutional* can always seek attorney's fees under 42 U.S.C. § 1988, as well as damages in the form of lost profits. The threat of having to pay these is deterrent enough to prevent the unsubstantiated risk that a city will violate the plain requirements of its ordinance.[2]

In essence, ZJ mischaracterizes the minimal risk at hand and seeks to justify an extraordinary remedy for that grossly misstated risk. ZJ's theory of the case not only assumes malfeasance by City officials, but also assumes that state courts will be dilatory in their correction of such obviously arbitrary and capricious acts. The opposite presumptions obtain. *President, Directors & Co. of Bank of United States v. Dandridge*, 25 U.S. 64, 69-70 (1827); *Schlesinger v. Councilman*, 420 U.S. 738, 756 (1975).

B. ZJ's Newly-Fashioned "Substantial or Significant" Argument is Unreviewable Here and Does Not Involve Unbridled Discretion to Deny a License.

Conceding that unbridled discretion in some form–either content-based censorship, amorphous standards for

[2] In contrast, the *FW/PBS* plurality specifically rejected the idea that a new adult business would be deterred by a ministerial denial. ZJ is silent on this issue, likely because it filed a preemptive suit to remain in an illegal location. ZJ's *amicus* First Amendment Lawyers Association ("FALA") actually hurts ZJ's position by demonstrating the significant investments and advanced planning necessary to start an adult business. FALA Brf. p. 16 (citing multi-million dollar adult businesses). With a quick administrative process and immediate access to judicial review, ZJ presents no reason why a decision cannot be obtained when a site for the business is identified, long before a scheduled opening.

license denials, or undue bureaucratic delay–is necessary for finding an unconstitutional prior restraint, ZJ returns to its recent, and only, claim of unbridled discretion: that the "substantial or significant" language in the definition of "adult bookstore, adult novelty store, or adult video store" gives Littleton officials discretion concerning whether the Ordinance, as a whole, applies to a given commercial enterprise. This argument, which is actually grounded in notice and due process concerns, is vital to ZJ's newly-minted theory of prior restraint, and appears under each of its three arguments for striking the Littleton Ordinance. *See, e.g.,* Resp. Brf. 27, 33, 45.

Contrary to ZJ's assertion, its "substantial or significant" theory of *prior restraint* was not raised below and is therefore unreviewable here. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). ZJ asserts that it previously raised what it broadly characterizes as "[t]he issue of improper discretion." Resp. Brf. 41. To be sure, ZJ raised (and prevailed on) its claims that unbridled discretion, in the form of potential indefinite delay, infected certain aspects of the prior version of the City's license application process. Brf. App. 26 n.14. But ZJ's citations to the record reveal no claim that the mere classification of a business as an "adult bookstore, adult novelty store, or adult video store" constitutes unbridled discretion amounting to an unconstitutional prior restraint under the First Amendment.[3]

[3] The cited pages of the complaint, R. 13-19, contain only one mention of "substantial or significant"—and that in the context of ZJ's due process claim. *See* R. 18-19 (references to the record refer to Appellant's Appendix filed in the Tenth Circuit). Similarly, the cited pages of ZJ's summary judgment motion, R. 395-397, fail to mention either the Ordinance's definition section in general or "substantial or significant" in particular. ZJ also cites a portion of its summary judgment brief, R. 411-419, but that discussion only supports the City's point that ZJ's "substantial or significant" argument was confined to the vagueness argument rejected by the lower courts. Finally, ZJ's opening brief in the Tenth Circuit is also unavailing. The cited pages of that document, pp. 26-28 and 44-53, are nearly verbatim repeats of ZJ's

(Continued on following page)

Moreover, it is telling that while ZJ claims to have raised this particular argument below, neither the District Court nor the Tenth Circuit mentioned it. It is well-settled that this Court will not pass upon an argument not addressed by the courts below. *NCAA v. Smith*, 525 U.S. 459, 470 (1999). This is true even when a party's brief in the court of appeals alludes to the theory it seeks to raise in this Court (which ZJ's does not). *Id.* at 470 n.6.

The record reveals that ZJ's "substantial or significant" argument was limited to its vagueness and overbreadth challenges that were rejected by the lower courts on both standing grounds and on the merits. Pet. App. 12-14 & n.6; *id.* at 47-55. Additionally, Littleton's sales tax license requirement—in—which ZJ couches its new "substantial or significant" argument–is not under review here. The Tenth Circuit held that "[because] this requirment is not specific to adult businesses it is irrelevant to the constitutionality of the licensing ordinance at issue in the present case." Pet. App. 21; *see also Lakewood*, 486 U.S. at 761. ZJ did not cross-petition for review of these rulings, and its recently-fashioned "substantial or significant" theory of prior restraint is not properly before the Court.

ZJ's expansive theory of prior restraint is also wrong as a matter of law. Simply put, it conflates the issue of whether a regulation *applies*, or constitutionally can apply, to a business–i.e., ZJ's failed vagueness and overbreadth challenges–with the essential element of a prior restraint: unbridled discretion "in deciding *whether or not to withhold a permit.*" *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969) (emphasis supplied).

summary judgment papers and are equally silent as to ZJ's argument that the mere definition of an "adult bookstore" is a prior restraint.

ZJ argues that this important distinction "has no substance," Resp. Brf. 38, but the distinction is critical: unbridled discretion to deny a license altogether effectuates the concern of *Freedman*–censorship. In contrast, the Littleton Ordinance mandates that even an entity stocking 100% sexually explicit material be given a license if it meets the objective standards of LCC § 3-14-8(A).

The Court's cases recognize the difference. For example, in *Cox*, 312 U.S. 569, the distance between marchers–and a corresponding question of whether the demonstrators' conduct constituted a "parade or procession"–was deemed "not material to the questions presented." *Id.* at 573; *see also Thomas*, 534 U.S. at 318 (ordinance regulating any "public assembly" or "parade" involving more than 50 people). In *Cox*, as here, the city's discretion to actually deny a permit was constrained by objective standards. The Court distinguished cases where unbridled discretion to define the activity constituted the power to deny a license and prohibit the activity altogether. *See Cox*, 312 U.S. at 578 (distinguishing *Cantwell v. Connecticut*, 310 U.S. 296 (1940), wherein the statute "authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion").[4]

The fact that ZJ could have easily opened its adult bookstore at another location in the City is obscured by ZJ's misleading argument concerning the City's sales tax license requirement: "Thus, the discretionary decision of

[4] ZJ's argument is also directly contrary to *Young*, wherein the Court rejected the dissenters' argument that alleged vagueness in the definition of "adult theater" amounted to an unconstitutional prior restraint. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976) (Stewart, J., dissenting); *id.* at 91 & n.4 (Blackmun, J., dissenting). The Court, noting that the City had no power to prohibit any message, held that "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young*, 427 U.S. at 62.

whether an applicant carries a substantial or significant amount of adult material will result in a denial of a sales tax license which in turn disqualifies the applicant from obtaining a license to present protected expression." Resp. Brf. 34-35. This inaccurate statement hides the fact that the only basis for denial of a sales tax license to an adult entertainment establishment is that the business is in an improper location. *See* LCC § 3-9-2-1, Reply Brf. App. 1 (stating that "the license shall be issued by the treasurer within five (5) days of application therefor, unless the adult entertainment establishment is in or proposed to be located in a location where such establishments are not permitted under this code"). ZJ's argument also ignores the fact that ZJ did not file its application for a sales tax license for more than seven months after it had opened for business and sued to have the City's zoning restrictions struck down.

A corollary to ZJ's "substantial or significant" argument is its risible claim that the determination that a business is an adult business "is essentially unreviewable." Resp. Brf. 38. When ZJ finally filed its sales tax license application, the City denied the license because ZJ was in an improper zone. ZJ could have obtained judicial review under Colo.R.Civ.P. 106(a)(4), but chose not to. However, ZJ obtained *immediate* access to judicial review of its vagueness claim in the District Court–though it never sought a temporary restraining order or preliminary injunction. This procedural history amply demonstrates that this case is not about judicial review of constitutional questions–which can be obtained at anytime–but about judicial review of specific license denials grounded in objective considerations.

C. ZJ's "Content-Based" Argument is Irrelevant and Wrong.

Ignoring the Court's cases that squarely address the content-neutrality of adult business regulations, *see, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-49 (1986), ZJ points to two cases where the issue was not before

the Court to support its claim that Littleton's Ordinance should be treated as content-based. *See Thomas*, 534 U.S. at 323 n.2; *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). This contention, which was rejected below, fails because it is outside the scope of the question presented and is contrary to the Court's established precedents.

The question under review goes to the procedures appropriate for a denial of an adult business license–not the level of scrutiny applicable to the substantive provisions of the Littleton Ordinance. The district court, following this Court's precedents, flatly rejected ZJ's "content-based" argument. Pet. App. 57-59. The Tenth Circuit affirmed, stating: "We see nothing in either *Thomas* or *Alameda Books* that requires reconsideration of our conclusion as to the applicable standard of review." Pet. App. 33 n.15. ZJ did not petition for review of this determination, and it is not properly before the Court.

In any event, ZJ's argument finds no support in either *Thomas* or *Alameda Books*. *Thomas* expressly reserves the question concerning prompt judicial review for another day (this case). *Thomas*, 534 U.S. at 325. Interestingly, while ZJ and its *amici* seize upon one footnote in the opinion, they are content to ignore the entire analytical framework of *Thomas*. As the City's opening brief and this brief show, the *Thomas* framework is the most appropriate fit for licensing regulations that involve neither amorphous standards nor undue delay.

Nor does *Alameda Books* advance ZJ's argument. As the *Alameda* plurality properly observed, the case concerned only the substantial government interest prong of *Renton*, and the question of content-neutrality was not before the Court. *Alameda Books*, 535 U.S. at 441 (plurality opinion).

Additionally, while Justice Kennedy's concurrence noted that the "content neutral" label is "imprecise," *id.* at 444-45, the opinion also reiterated the secondary effects basis for regulating adult businesses and concluded that the "central holding of *Renton* is sound." *Id.* at 448 (Kennedy, J., concurring in judgment); *see also Renton*, 475 U.S. at 47 (noting imprecision of labels).

This is consistent with the Court's cases, which plainly teach that preventing secondary effects is an "undeniably important" government interest unrelated to the content of speech. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291-95 (2000); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that "[t]he government's purpose is the controlling consideration "in determining content-neutrality).

In this case, as in *Alameda Books*, the ordinance at issue "is not limited to expressive activities" because it "also extends, for example," to "sexual encounter centers," likely "to cause similar secondary effects." *Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring in judgment). Thus, the Ordinance "is not even directed to communicative activity as such," *Thomas*, 534 U.S. at 322, but at a category of commercial enterprises associated with secondary effects.[5] *See* LCC § 3-14-1 (explaining the city's interest in "reducing or eliminating the adverse secondary effects from such businesses" and that the ordinance has "neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials").

ZJ claims a different distinction by asserting that the Littleton Ordinance does not have a built-in secondary effects rationale, but this allegation is contrary to both the record and to common sense. First, the District Court specifically found that "Chapter 14 is narrowly tailored to serve a substantial government interest and leaves open ample alternative channels of communication," Pet. App. 60, and this conclusion was affirmed on appeal. Pet. App. 37-38 (concluding that "the ordinance meets the requirements of *Renton*"). Second, since the substantive provision of the

[5] That the City's regulation is directed only to the secondary effects of certain *businesses*, and not certain *speech*, is amplified by the fact that although other stores, including convenience stores, undoubtedly sell sexually explicit materials in the City, they are not associated with the adverse effects of adult bookstores specializing in hard-core fare, and thus are not regulated by the City's Ordinance.

Ordinance attacked by ZJ–zoning–advances important government interests, it is beyond cavil that a ministerial license procedure for ensuring adult businesses set up in proper locations is also sound. *Young*, 427 U.S. at 62. To hold otherwise would suggest that a city must wait until after a substantive violation has occurred before enforcing a constitutionally valid regulation, a proposition directly contrary to *Renton*. *Renton*, 475 U.S. at 52.

Most important, ZJ's "content-based" argument ignores more than two decades of this Court's jurisprudence–upon which hundreds of municipalities have relied in adopting adult business ordinances. Pet. Brf. 29-36; *Renton*, 475 U.S. at 54 (upholding ordinance as narrowly tailored because it was limited to "adult" theaters).

ZJ's answer to *Renton*'s narrow tailoring requirement, 475 U.S. at 54–by which Littleton's Ordinance must be limited to "adult" businesses–is unresponsive. Resp. Brf. 45. ZJ's simply refashions and repeats its "substantial or significant" vagueness claim and then argues that the Littleton Ordinance is overly broad, i.e., not narrowly tailored. *Id.* These previously rejected arguments, however, do not help ZJ overcome the Court's applicable precedents which, starting with *Young*, hold that properly drafted adult business ordinances are to be evaluated under the test for content-neutral time, place, and manner regulations.

Finally, it bears repeating, *see* Pet. Brf. 30, that since ZJ concedes that "[n]one of the grounds *for denying a permit* has anything to do with what a speaker might say," *Thomas*, 534 U.S. at 322 (emphasis supplied), it has no claim that the procedural question under review is affected by its failed argument against content-neutrality.

II. Legislative Mandate of Judicial Deadlines is Legally Impossible and Would Cause Substantial Harms Not Warranted by License Denials Under Narrow, Objective Standards.

ZJ claims that a "prompt, final judicial decision," *Freedman*, 380 U.S. at 59, is required for Littleton's non-discretionary license denials, but completely fails to address the City's argument that neither it, nor the Colorado legislature, have the ability under the Colorado Constitution to mandate judicial deadlines. Pet. Brf. 37-38; *Williams v. People*, 38 Colo. 497, 504-06, 88 P.2d 463, 465-66 (1907). While ZJ cites an Aurora Colorado ordinance that purports to mandate a prompt decision, Resp. Brf. 46-47, the ordinance is presumptively invalid. *Alessi v. Municipal Court of Canon City*, 38 Colo. App. 153, 154 556 P.2d 75, 88 (1976) (explaining that Colo. Const. Art. VI, § 21 vests the Colorado Supreme Court with the exclusive "power and obligation to promulgate rules governing the procedure in civil and criminal cases" and rules otherwise promulgated are invalid); *accord*, *749 Broadway Realty Corporation v. Boyland*, 1 Misc. 2d 575, 578, 140 N.Y. Supp. 766, 769 (N.Y. Spc. Term 1955); *Silver v. City of Omstead Falls*, 20 Oh. App. 3d 361, 362, 486 N.E.2d 852, 854 (1984). Similarly, while ZJ points to state legislation in other jurisdictions–which is irrelevant to this case–even the validity of that legislation is doubtful. *Mai Lee Le v. City of Citrus Heights*, 1999 U.S. Dist. LEXIS 13477, *23-24 (E.D. Cal. 1999).

Instead, ZJ–admitting that the City's view of Colorado law is correct–skips directly to its argument that cities, after denying a license on objective grounds,[6] should

[6] Adding to the confusion of the issues, *amicus* FALA submits non-record evidence to substantiate its alleged parade of horribles from the licensing of adult businesses. FALA Brf. 15-17, Appendix A, Appendix B. This extraneous non-record material should be stricken per Rule 32.3. Moreover, these observations are irrelevant to both the Littleton Ordinance and the issue in this case–which centers on the type of judicial review that

(Continued on following page)

nevertheless be required to give a license (i.e., a "provisional license") to that same business until the *business's lawsuit* is resolved. ZJ can provide no support for its sweeping view that the First Amendment provides a sexually oriented business the *per se* right to operate wherever and however it pleases until a court rules otherwise. Pet. Brf. 38-41.

Adopting ZJ's position that *municipal ordinances* must guarantee a judge's prompt decision would presumptively–and immediately–invalidate adult business ordinances across the country.[7]

ZJ's suggested remedy completely guts the ability of cities to regulate secondary effects through a reasonable, objective licensing procedure.[8] Under an ordinance like Littleton's, a City could be required to grant a license to,

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is necessary for license denials based on narrow, objective standards. As noted above, state and federal courts are always open–without an exhaustion requirement–to hear plenary challenges to ordinances on grounds of vagueness, overbreadth, or unbridled discretion.

[7] Counsel's informal review of municipal codes reveals that, in addition to the numerous Colorado ordinances mentioned previously, Pet. App. 136, at least 230 cities have licensing procedures for adult businesses that would be adversely affected by a mandate of judicial deadlining. Most of these adult business licensing ordinances provide review similar to that provided by Littleton; i.e., certiorari review or a similar statutory process for appealing administrative decisions. *See, e.g.*, City of Rochester (NY) Code § 98-19; Green Bay (WI) Code § 6.34(9)(f); Longview (TX) Code § 58-125; St. Paul (MN) Code § 18.03; Charleston (WV) § 18-387; Ann Arbor (MI) § 55.1X.5:102; St. Louis County (MO) Code § 821.100; Lawrence (KS) City Code § 6-308; Miami Springs (FL) Code § 132-15(A).

[8] The State of Ohio, on behalf of the *amici* States, has filed a motion to participate in oral argument based, in part, upon the desire to address the issue of provisional licenses. The City agrees that the interest of the States are significant in this case because an adverse ruling could have a troubling impact upon state courts and would undermine essential principles of federalism. However, the City believes that oral argument time should not be devoted to discussing the alleged remedy of a "provisional license." As the City has demonstrated, such a remedy is wholly unjustified.

for example, an applicant that is underage or that seeks to operate an adult business in an improper location, such as in the wrong zoning district or directly adjacent to a childcare facility, school, church, or another adult business. These outcomes–which, unlike the showing of a censored film, are clearly undesirable and potentially destructive–would be the unavoidable result if a deadline for final judicial decision were missed. Moreover, the City could be significantly hampered in enforcing a number of public health and safety regulations enforced through licensing. *See, e.g., City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 282 (2001) (noting sanctions against adult bookstore for "permitting minors to loiter on the premises, failing to maintain an unobstructed view of booths in the store, and allowing patrons to engage in sexual activity inside the booths"); *California v. LaRue*, 409 U.S. 109, 111 (1972) (describing lewd and unsanitary conduct in nude cabarets).

The proper remedy for any deficiencies in judicial review, if they exist, can be provided to a litigant who can show that those deficiencies have prejudiced it. The remedy should not be to grant relief to ZJ, who did not even invoke state court review, and who made no complaint about the federal court procedures it did invoke. In other cases in which the Court has concluded that state procedures were constitutionally inadequate, the relief has been to require state courts to provide adequate remedies to a party litigating in state courts–not to prevent the operation of a state or local regulatory program. *See, e.g., Reich v. Collins*, 513 U.S. 106 (1994); *Ward v. Love County*, 253 U.S. 17 (1920); *see also* Brief of *Amicus* Community Defense Counsel 9-13 (explaining that if judicial deadlines are required, the Court should announce a clear First Amendment rule that lower courts are constitutionally constrained to follow in deciding appeals of license denials).

In any event, there is no basis for radically expanding *Freedman*'s prompt judicial decision requirement to objective licensing decisions. *Graff*, 9 F.3d at 1331 (*en banc*) (Flaum, J., concurring) (explaining that expanding

Freedman's prompt judicial decision requirement to substantially dissimilar laws "would embark us on a senseless departure from the core logic undergirding the holdings in *Freedman* and its progeny"). As we have demonstrated, the standards in LCC § 3-14-8(A) "guide the official's decision and render it subject to effective judicial review," *Thomas*, 534 U.S. at 323, and ZJ's unsubstantiated risk of outright malfeasance is unrelated to the concerns that animate *Freedman*'s judicial deadline requirement.

CONCLUSION

For the foregoing reasons and those stated in the opening brief and the briefs of the City's *amici*, the decision of the court of appeals should be reversed.

March 1, 2004

Respectfully submitted,

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CITY OF LITTLETON, COLORADO

ORDINANCE NO. 4

Series of 2004

INTRODUCED BY COUNCILMEMBERS:
Conklin & Taylor

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO, AMENDING SECTIONS OF CHAPTER 9 OF TITLE 3 OF THE LITTLETON CITY CODE ENTITLED RETAIL SALES AND USE TAX.

WHEREAS, the City has recently made amendments to its Adult Entertainment Establishments Ordinance relating to various time limitations for licensing procedures relating to such establishments; and

WHEREAS, it is necessary to provide for conforming amendments to the City's Retail Sales And Use Tax Ordinance.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Section 3-9-2-1 of the Littleton City Code is hereby amended to read:

> 3-9-2-1: LICENSE REQUIRED: It shall be unlawful for any person to engage in the business of selling at retail, as the same as defined in this chapter, without first having obtained a license therefore, which license shall be applied for in a form prepared by the city treasurer. No fees shall be charged for the issuance of the license, and it shall be issued by the treasurer, unless he OR SHE determines that the business to be operated would violate any of the statutes of the State of Colorado, of the United States or

any of the provisions of this code. ZONING APPROVAL SHALL BE REQUIRED FOR ALL SALES AND USE TAX LICENSES PROVIDED, HOWEVER, THAT IF THE PERSON OR ENTITY SEEKS A SALES AND USE TAX LICENSE FOR AN ADULT ENTERTAINMENT ESTABLISHMENT, THE LICENSE SHALL BE ISSUED BY THE TREASURER WITHIN FIVE (5) DAYS OF APPLICATION THEREFORE, UNLESS THE ADULT ENTERTAINMENT ESTABLISHMENT IS IN OR PROPOSED TO BE LOCATED IN A LOCATION WHERE SUCH ESTABLISHMENTS ARE NOT PERMITTED UNDER THIS CODE. ~~The~~ Said license shall be and remain in full force and effect until and unless revoked.

Section 2: Section 3-9-2-3 of the Littleton City Code, is hereby amended to read:

> 3-9-2-3: APPLICATION: The license required by Section 3-9-2-1 of this chapter shall be granted only upon application, stating the name and address of the person desiring such license, the name of such business and the location, including the street number of such business, and, FOR BUSINESSES OTHER THAN ADULT ENTERTAINMENT ESTABLISHMENTS, such other facts as may be reasonably required by the city treasurer.

Section 3: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 4: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 6th day of January, 2004, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of January 8, 2004.

PUBLIC HEARING on the Ordinance to take place on the 20th day of January, 2004, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton, Colorado, at the hour of 7:00 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading, following public hearing, by a vote of 7 FOR and 0 AGAINST on the 20th day of January, 2004 and ordered published by reference only in the Littleton Independent on the 22nd day of January, 2004

ATTEST:

/s/ Julie Bower
CITY CLERK

/s/ John K. Ostermiller
PRESIDENT OF CITY COUNCIL

APPROVED AS TO FORM:

/s/ Larry W. Berkowitz
CITY ATTORNEY

Supreme Court, U.S.
FILED
DEC 12 2003
OFFICE OF THE CLERK

No. 02-1609

IN THE

Supreme Court of the United States

THE CITY OF LITTLETON, COLORADO,
Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., A COLORADO LIMITED LIABILITY COMPANY D/B/A CHRISTAL'S,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE AMERICAN PLANNING ASSOCIATION, AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

As rephrased by the Court, the question presented is:

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215 (1990) entails a prompt judicial determination or a prompt commencement of judicial proceedings.

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INTEREST OF THE *AMICI CURIAE*

Amici National League of Cities, International Municipal Lawyers Association, International City/County Management Association, National Conference of State Legislatures, National Association of Counties, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issue presented in this case: whether a municipal ordinance that requires the licensing of sexually oriented businesses is invalid if it does not assure that judicial challenges to license denials will be adjudicated promptly.[1]

Amicus American Planning Association (APA) is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning—including physical, economic and social planning—at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society. The APA represents more than 30,000 professional planners, commissioners, and citizens involved with urban and rural planning issues.

This case has great practical importance for States and local governments across the Nation. As the Court has noted on a number of occasions, local governments have found the effective regulation of adult businesses to be essential for the prevention of crime, the preservation of property values, and

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

the maintenance of neighborhood quality. See, *e.g.*, *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). To accomplish these purposes, States and municipalities have adopted licensing regulations similar to the Littleton ordinance challenged in this case.

If respondent prevails in its argument that prompt judicial resolution of challenges to the application of such regulations must be assured—a guarantee that it is beyond the power of local governments to provide—these regulations will be rendered invalid, significantly undercutting the ability of States and local governments to combat the corrosive secondary effects of sexually oriented businesses. Because *amici* have substantial experience with the sort of ordinance at issue here and will be directly affected by the Court's decision, they submit this brief to assist the Court in the resolution of this case.

STATEMENT

1. Like innumerable municipalities across the Nation, the City of Littleton, Colorado ("the City"), has imposed restrictions on the operation of adult businesses.[2] Such establishments may operate only in specified areas of the City: they may not be located within five hundred feet of a

[2] "Adult business" is defined as "[a]n adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment or nude model studio." Littleton City Code § 3-14-2. Each of these individual terms is itself further defined by reference to specified sexual activities that take place at a given location or to specified portions of the anatomy that are visible in materials that are shown or displayed there.

The relevant provisions of the Littleton City Code are reproduced in the appendix to petitioner's brief on the merits.

church, school, child-care facility, public park, locally regulated massage parlor, or community correctional facility, and also may not operate within one thousand feet of another adult business or of a state-regulated massage parlor. Littleton City Code §§ 3-14-3(B) & (C). Moreover, they may be located only in districts zoned for industrial uses. See Pet. App. 34, 62.

In addition, and of particular importance here, adult businesses may not operate in Littleton without a license. The City Code specifies the grounds on which a license may be denied: an applicant is disqualified, for example, if it recently has had an adult business license suspended or revoked, has operated an adult business recently determined to be a public nuisance, or has not obtained the required sales tax license. Littleton City Code § 3-14-8(A).[3] The City Code also specifies the procedure for obtaining—and for challenging the denial of—a license. In its current form, the Code provides that the City Clerk must act on an application within 14 days of the date of its submission. *Id.* If the City Clerk denies the application, "he/she shall make written findings of fact stating the reasons for the denial." *Id.*, § 3-14-8(B). The

[3] In all, eight grounds are specified for denial of a license: an application must be rejected if the applicant is underage; if the applicant made a false statement in connection with the application; if the applicant or specified individuals associated with the applicant had an adult business license revoked within the preceding year; if the applicant operated an adult business that has been determined to be a public nuisance within the preceding year; if a corporate parent of the applicant is not authorized to do business in the State; if the applicant is overdue in the payment of city taxes, fees, fines, or penalties imposed in relation to an adult business; if the applicant has not obtained the required sales tax license; and if the applicant has been convicted of a specified criminal act within the preceding five years. Littleton City Code § 3-14-8(A). The City Code also specifies the grounds for revocation of a license, which principally include allowing misconduct of various kinds to take place on the premises. See *id.*, § 3-14-11(A).

applicant may then bring a challenge before the City Manager, who must hold a hearing on the matter within 14 days and must issue a ruling within two days after the hearing is completed, "based on findings of fact."[4] *Id.* The license is deemed approved if any city official or department fails to comply with these deadlines. *Id.*, § 3-14-8(C).

If the license is denied and the denial is sustained by the City Manager, the decision may be appealed to state district court "pursuant to [Colo. R. Civ. P.] 106(a)(4)." *Id.*, § 3-14-8(B).3. This rule authorizes a district court to stay any administrative decision denying a license. See Colo. R. Civ. P. 106(a)(4)(V). It also permits, but does not require, the court to provide expedited review in such cases. See *City of Colorado Springs* v. *2354 Inc.*, 896 P.2d 272, 284 & n.9 (Colo. 1995). In addition, license applicants "may challenge the constitutionality of ordinances as applied in [Colo. R. Civ. P.] 106(a)(4) review proceedings." *Id.* at 283 n.8 (citing *Tri-State Generation & Transmission Co.* v. *City of Thornton*, 647 P.2d 670, 676 n. 7 (Colo. 1982)).

2. In the fall of 1999 respondent Z.J. Gifts D-4, L.L.C., opened an adult business in Littleton's business district, even though respondent had not obtained the required adult business license and previously had been informed by city officials that adult businesses were not permitted at that location.[5] Pet. App. 2. Shortly before opening its business, respondent commenced this suit against the City in federal district court pursuant to 42 U.S.C. § 1983, arguing (among other things) that Littleton's regulations of adult businesses

[4] At the time of the decision below, the City Clerk and City Manager each had 30 days within which to act. See Pet. App. 5-6. An amendment adopted in November 2003 shortened that period.

[5] The City also alleges that respondent does not possess the sales tax license required by city law. See Littleton City Code § 3-14-8(A).7; *City of Littleton* v. *Z.J. Gifts, D-4 LLC*, No. 01CA2319 (Colo. Ct. App. Feb. 20, 2003), slip op. 9.

are inconsistent with the First Amendment because they do not guarantee that a judicial challenge to the denial of a license will be adjudicated promptly. The district court rejected this argument, upholding the constitutionality of the City's adult business licensing ordinance. Pet. App. 40-66.

In relevant part, the Tenth Circuit reversed. Pet. App. 1-39.[6] The court began by stating "that 'licensing of adult entertainment establishments' must be analyzed as a prior restraint." *Id.* at 16 (citation omitted). From that starting point, the court concluded that Littleton's mechanism for the review of license denials does not comport with the requirements set out in *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990). Although the City requires prompt administrative disposition of a license application and allows for an immediate judicial challenge to the denial of a license, the Tenth Circuit held that "mere 'access' to judicial review" to contest such a denial is insufficient and that, instead, "*FW/PBS* requires a prompt final judicial *decision* regarding the validity of the denial." *Id.* at 32 (emphasis in original). Because Colorado Rule of Civil Procedure 106 does not *guarantee* that a court will decide a case challenging a license denial within a set time, the court held the judicial review feature of the Littleton ordinance unconstitutional.

While the federal litigation was continuing, the City did not prevent respondent from operating its business. Instead, prior to the decision of the U.S. district court, the City began an injunctive action against respondent in state court, seeking to require compliance with the City Code. Respondent opposed the City by arguing, among other things, that Littleton's licensing system is inconsistent with the First Amendment.

[6] The Tenth Circuit also addressed a number of other issues that are not now before the Court. It held unconstitutional a City requirement that a letter from a zoning official accompany the application to operate an adult business (Pet. App. 20-24) but upheld the ordinance's location restrictions. *Id.* at 33-38.

See *City of Littleton* v. *Z.J. Gifts, D-4*, slip op. 3. The state trial court ruled for the City, determining that respondent should be enjoined from operating its business in a manner that violates the City's Code. In an opinion issued after the Tenth Circuit rendered the decision under review here, the Colorado Court of Appeals reversed the state trial court, holding that the injunction was too vague to conform to the requirements of Colorado law. *Id.* at 10-12. The court remanded the case for consideration of various state-law issues regarding application of the licensing requirements. See *id.* at 8-10. That suit is now pending in state trial court. At no point has respondent been required to cease operation of its business while awaiting the outcome of judicial proceedings.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision that a scheme for the licensing of adult businesses must guarantee a prompt judicial decision when a business contests the denial of a license is flawed on several levels. *Freedman* v. *Maryland*, 380 U.S. 51 (1965), held that such judicial promptness is required when a State imposes a system of censorship; when applying such a regime, the Court explained, the censor must bear the burden of seeking court approval for the suppression of speech and any restraint imposed in advance of a judicial decision must be temporary. In *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990), however, the lead opinion took a different approach to the judicial review requirement where the licensing of sexually oriented businesses is at issue, appearing to find it constitutionally sufficient that the adult business have an opportunity to *initiate* a court challenge prior to the cancellation of its license. This departure from *Freedman* is only logical. The Court held in *FW/PBS* that the administrators of licensing schemes for adult businesses (unlike the censors in a case like *Freedman)* do *not* bear the burden of seeking court approval for license denials—and it

was the requirement that the censor obtain advance judicial authorization for the suppression of speech that was the essential predicate for *Freedman*'s further insistence on the prompt completion of judicial review.

More fundamental First Amendment principles confirm that prompt *adjudication* of judicial challenges to the denial of licenses for sexually oriented business is not necessary. Such a promptness requirement makes sense when the regulation of speech is presumptively unconstitutional because it involves censorship of content or unconstrained administrative discretion. But regulations of adult businesses like those at issue here do not require an assessment of the content of speech and give local officials very limited discretion. As a consequence, such licensing regimes do not allow for the suppression of particular ideas. At the same time, the proprietors of adult businesses have a substantial economic stake in seeing the judicial review process through to completion, a reality that reduces the need for an immediate judicial resolution. In these circumstances, the availability of a temporary restraining order or preliminary injunction to prevent abusive uses of the licensing process suffices to protect the interest in free expression.

Indeed, we believe that challenges to licensing schemes for sexually oriented businesses do not call for the use of prior restraint analysis *at all*. It is appropriate to treat a regulation of speech as a prior restraint when it may be applied to suppress particular points of view. In contrast, regulations that serve purposes unrelated to the content of expression are deemed content neutral, even if they have an incidental effect on some speakers but not others. That analysis should govern licensing requirements for sexually oriented businesses. The Court has settled that such regulations, which are directed at the secondary, non-expressive effects of adult businesses, are justified without reference to the content of the regulated

speech. That sort of restriction is properly analyzed as a time, place, and manner regulation rather than as a prior restraint. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE THE PROMPT RESOLUTION OF CHALLENGES TO THE APPLICATION OF A MUNICIPAL ORDINANCE REQUIRING THE LICENSING OF SEXUALLY ORIENTED BUSINESSES

The rule announced by the court below, which precludes the use of municipal licensing requirements for adult businesses unless a prompt judicial resolution of any challenge is guaranteed, is one of enormous practical importance to States and local governments across the Nation. The Court has repeatedly noted the efforts by municipalities to address the problems of crime, declining property values, and other aspects of urban blight that often accompany sexually oriented businesses. See, *e.g.*, *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). As the substantial volume of litigation raising the issue presented here suggests,[7] many

[7] See, *e.g.*, *11126 Baltimore Blvd., Inc.* v. *Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir.), cert. denied, 516 U.S. 909 (1995); *Chesapeake B & M, Inc.* v. *Harford County*, 58 F.3d 1005 (4th Cir. 1995); *TK's Video, Inc.* v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Grand Brittain, Inc.* v. *City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *East Brooks Books, Inc.* v. *City of Memphis*, 48 F.3d 220, 225 (6th Cir.), cert. denied, 516 U.S. 909 (1995); *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1101-1102 (9th Cir. 1998); *Boss Capital, Inc.* v. *City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999); *Lady J. Lingerie, Inc.* v. *City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Harkins* v. *Greenville County*, 533 S.E.2d 886 (S.C. 2000), cert. denied, 531 U.S. 1125 (2001); *City of Waukesha* v. *City News & Novelty, Inc.*, 604 N.W.2d 870 (Wis. 2000), cert. dismissed, 531 U.S. 278 (2001).

jurisdictions have responded to these problems by enacting licensing schemes very similar to the one employed in Littleton. But although these licensing ordinances provide for judicial review of licensing decisions, they generally do not, and could not, require judicial resolution of challenges to license denials by a date certain. "Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter" (*Nightclubs, Inc.* v. *City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000)), which means that the Tenth Circuit's approach would invalidate "city ordinances on the basis of the swiftness or slowness of that particular state's judicial procedures." *Id.* at 897 (Merritt, J., dissenting).

As a result, the rule contended for by respondent would render unconstitutional a very substantial body of municipal legislation, an outcome that would cause significant disruption across the country. At the same time, local governments would lose the flexibility that the Court has recognized as important in addressing local problems that take widely varying forms. See *Renton*, 475 U.S. at 52; *American Mini Theatres*, 427 U.S. at 71 (plurality opinion). Fortunately, however, that outcome is not required here. The Tenth Circuit's approach is not supported by precedent; cannot be justified by the constitutional principle that underlies the Court's decisions in this area; and is inconsistent with the First Amendment rules governing the regulation of adult businesses generally. The judgment below invalidating the Littleton ordinance accordingly should be reversed.

A. *FW/PBS* Does Not Require The Prompt Resolution Of Judicial Challenges To License Denials

1. A classic prior restraint, in which government officials are given substantial discretion to suppress speech that they dislike, must be subjected to the most rigorous procedural requirements. That is the rule stated in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), where state law empowered officials to prevent the exhibition of films that they did not find to be "moral and proper." *Id.* at 53 n.1. The *Freedman* Court held that, for such a restraint to be valid, (1) "the burden of proving that the film is unprotected expression must rest on the censor"; (2) "the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes affected expression," meaning that the censor either must issue a license "within a specified brief period * * * or go to court to restrain showing the film"; and (3) "the procedure must also assure a prompt and final judicial decision." *Id.* at 58-59. See *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 321 (2002); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (opinion of O'Connor, J.). Although the Court's decisions leave some ambiguity about the precise nature of this "prompt" judicial review requirement where censorship schemes like the one considered in *Freedman* are at issue, we recognize that there is some support for the proposition that such schemes will satisfy the constitutional mandate only if they provide for "a final judicial determination on the merits within a specified, brief period." *Blount* v. *Rizzi*, 400 U.S. 410, 417 (1971).[8]

[8] See *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (State must provide "immediate appellate review"); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141, 142 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 730 (1963) ("an almost immediate judicial determination of the validity of the restraint"). Other decisions, however, have not appeared to contemplate the same immediacy in the judicial review process. See, *e.g.*, *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 771 (1988) (referring to "relatively speedy" judicial review); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975) ("a prompt final judicial determination must be assured"). Indeed, *Freedman* itself emphasized that the Court did "not mean to lay down rigid time limits or procedures." 380 U.S. at 61.

The procedures announced by the Court in *Freedman* were devised to address the particular problems posed by a regime that censors speech on the basis of content. As the Court recently explained, it

> recognized in *Freedman* that a scheme conditioning expression on a licensing body's prior approval of content "presents peculiar dangers to constitutionally protected speech." [380 U.S.] at 57. "The censor's business is to censor," *ibid.*, and a licensing body likely will overestimate the dangers of controversial speech * * * ." *Id.* at 52 n.2. Cf. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561, and n. 11 (1975). In response to these grave "dangers of a censorship system," *Freedman*, 380 U.S. at 58, [the Court] held that a film licensing process must contain certain procedural safeguards in order to avoid constituting an invalid prior restraint[.]

Thomas, 534 U.S. at 321.

In *FW/PBS*, however, the Court appeared to take a very different approach to the judicial review requirement where the licensing of sexually oriented businesses is at issue. Justice O'Connor's lead opinion for three Justices in *FW/PBS* did not indicate that there must be a prompt judicial "determination" or "immediate" judicial review, as *Freedman* and its progeny required. Instead, Justice O'Connor's opinion indicated that the licensing regime must provide only for "the *possibility* of prompt judicial *review*." 493 U.S. at 228 (emphasis added). Justice O'Connor repeated this formulation throughout her opinion. See *id.* at 229 (emphasis

added) (referring to "an *avenue* for prompt judicial review"); *id.* at 230 (emphasis added) (referring to "the *availability* of prompt judicial review"). This approach seems to contemplate a regime in which it is sufficient that the adult business have an opportunity to *initiate* a court challenge prior to the cancellation of its license.[9] As the court below itself recognized (see Pet. App. 25), several lower courts accordingly have read this language to permit—and municipalities have relied upon it in enacting—licensing ordinances that comply with the judicial review requirement by providing nothing more than "*access to the courts* within a brief period." *TK's Video, Inc.* v. *Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) (Higginbotham, J.).[10]

That the lead opinion in *FW/PBS* believed the First Amendment to be satisfied in this setting by timely access to judicial review finds support in the authority cited by Justice O'Connor. In describing the judicial review requirement, Justice O'Connor's opinion pointed not only to *Freedman* and *Skokie*, but also to *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). There, the Court referred to the

[9] Justice White and Chief Justice Rehnquist were of the view that *Freedman* was *wholly* inapplicable in this setting (493 U.S. at 244 (opinion of White, J.)), as was Justice Scalia under a different rationale. *Id.* at 250 (opinion of Scalia, J.). In contrast, Justice Brennan, writing for three Justices in *FW/PBS*, would have held that *all* of the procedural safeguards identified in *Freedman* must be provided in the adult business context. *Id.* at 239 (Brennan, J., concurring in the judgment). In this setting, the departure from *Freedman* undertaken by Justice O'Connor's opinion commanded majority support in the Court.

[10] Accord *Boss Capital*, 187 F.3d at 1256; *Graff* v. *City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993), cert. denied, 511 U.S. 1085 (1994); *Grand Brittain*, 27 F.3d at 1070; *Jews for Jesus, Inc.* v. *Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). But see *Nightclubs, Inc.*, 202 F.3d at 892; *Baby Tam & Co.*, 154 F.3d at 1101-1102; *11126 Baltimore Blvd.*, 58 F.3d at 998-1001; *East Brooks Books*, 48 F.3d at 225.

"*availability* of expeditious judicial review" (*id.* at 155 n.4 (emphasis added)), illustrating the meaning of that phrase by reference to Justice Harlan's *Shuttlesworth* concurrence and Justice Frankfurter's concurring opinion in *Poulos* v. *State of New Hampshire*, 345 U.S. 395 (1953). Those opinions, in turn, found it sufficient that the applicant for a permit was able to "invoke relief by way of mandamus or certiorari." *Id.* at 420 (Frankfurter, J., concurring in the result). See *Shuttlesworth*, 394 U.S. at 162 n.4 (Harlan, J., concurring) ("Since the time remaining [before a scheduled event for which a license was sought] was sufficient to obtain relief by way of mandamus, there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure."). These avenues for review do not impose absolute time limits for judicial decision.

2. In addition, the conclusion of a majority of the Justices in *FW/PBS* that the *Freedman* test does not in all respects govern the licensing of adult businesses establishes that the First Amendment does not, in this context, require a fixed date for the resolution of judicial challenges to license requirements. In particular, Justice O'Connor's lead opinion held that, because regulation of the licensing of sexually oriented businesses is not "presumptively invalid" (493 U.S. at 229), *Freedman*'s requirement that *the censor* initiate judicial proceedings is inapplicable in the adult business context.[11] The requirement that the censor go to court, however, was an essential premise for *Freedman*'s further insistence on the prompt completion of judicial review—meaning that the abandonment of the former requirement necessarily affects the application of the judicial review mandate to the licensing of sexually oriented businesses.

[11] As noted above (at note 9, *supra*), three other Justices, who would have gone considerably farther, agreed in *FW/PBS* that this aspect of *Freedman* (among others) is inapplicable in the adult business setting.

The Court explained in *Freedman*:

> While the State may require advance submission of all films, * * * *the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression.* * * * [O]bviously a procedure requiring a judicial determination suffices to impose a valid final restraint. * * * To this end, the exhibitor must be assured * * * that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, *even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the distributor.* * * * *Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.*

Freedman, 380 U.S. at 58 (emphasis added). The Court's holding in *Freedman* thus was that, where censorship schemes are at issue, the decision to prohibit expression may not have final effect absent a judicial decision; that any restraint imposed in advance of such a judicial decision may be only temporary; and that, because speech might be inhibited after the expiration of a temporary administrative restraint during the pendency of the required judicial review, a prompt final judicial decision must be assured "to minimize the deterrent effect of an interim" license denial.

This analysis, however, has no application where the licensing of adult businesses is concerned because in that setting a restraint on speech *may* become final in the absence of a judicial decision; denial of a license *will* be permanent

unless the applicant decides to challenge the restraint in court. As a consequence, the administrative decision to deny a license to a sexually oriented business need *not* be only temporary. And this means that *Freedman*'s rationale for requiring a prompt judicial resolution—the concern that speech might be inhibited during the period between the expiration of a temporary administrative restraint and the rendering of the judicial determination that is necessary for the censor's decision to become final—has no bearing on schemes for the licensing of adult businesses, where a judicial decision is not a prerequisite for a license denial to become effective. It therefore is implicit in the analysis of the lead opinion in *FW/PBS* that licensing schemes for adult businesses need not impose rigid deadlines on the judicial review process.

B. First Amendment Principles Establish That Prompt Resolution Of Judicial Challenges To License Denials Is Not Necessary

As the preceding discussion suggests, more fundamental First Amendment principles, many of which were discussed by Justice O'Connor's opinion in *FW/PBS*, also indicate that a licensing scheme for sexually oriented businesses need not guarantee a prompt judicial decision when license denials are challenged. The decisions in which the Court has applied a requirement of expedited judicial review involved regulations of speech that were "presumptively invalid." *FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.). These included, most prominently, cases presenting censorship schemes in which state officials passed judgment on the *content* of speech, as in *Freedman* itself. See, *e.g.*, *Freedman*, 380 U.S. at 52, 54-55; *Southeastern Promotions*, 420 U.S. at 552-553; *Bantam Books*, 372 U.S. at 66. Such restrictions present particular dangers because they permit the suppression of speech by officials who may disapprove of the ideas expressed or the means of expression; because even well-intentioned censors

may be led into error by the fact that fully protected speech often is separated from expression that is legitimately subject to regulation (such as obscenity) "only by a dim and uncertain line" (*Bantam Books*, 372 U.S. at 66); and "[b]ecause the censor's business is to censor," meaning that state officials with responsibility for censorship may be insensitive "to the constitutionally protected interest in free expression." *Freedman*, 380 U.S. at 57-58. See *Thomas*, 534 U.S. at 321.

In addition, the Court has suggested that a prompt judicial determination may be necessary when issuance of a permit or license is "'contingent upon the uncontrolled will of an official.'" *Shuttlesworth*, 394 U.S. at 151 (citation omitted). See *Thomas*, 534 U.S. at 323; *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 133 (1992); *Southeastern Promotions*, 420 U.S. at 553. In such cases, as in the ones involving the censorship of content, "the prior restraint [i]s embedded in the licensing system itself, *operating without acceptable standards*." *Ibid.* (emphasis added). Thus, "none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment. Instead, they involved censorship." *Boss Capital*, 187 F.3d at 1256.

Ordinances like the one at issue here are quite different from the *Freedman* paradigm in a variety of material respects. *First*, as Justice O'Connor noted in *FW/PBS*, licensing schemes for adult businesses do not involve an assessment of the content of regulated speech, and therefore do not allow for the suppression of particular ideas. "Under [such an] ordinance, the City does not exercise discretion by passing judgment on the content of any protected speech. Rather, the City reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.). See *Boss Capital*, 187 F.3d at 1256 ("The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the content

of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license."). Officials in Littleton thus base their licensing decisions on objective factors such as the regulatory and criminal history of the owner, instead of on the substance of the applicant's expression. See Littleton City Code § 3-14-8(A).

Second, such licensing systems give local officials very limited discretion. Administrators are not permitted "'to roam essentially at will'" (*Shuttlesworth*, 394 U.S. at 153 (citation omitted)), or to exercise a judgment that has a large subjective component. Instead, municipal decisionmakers are directed to judge compliance only with a defined set of neutral and objective factors.

Third, as Justice O'Connor also explained in *FW/PBS*, the practical impact of a licensing regime for adult businesses differs significantly from that of the censorship system at issue in *Freedman*. The expense and delay inherent in challenging the suppression of a *single* movie or book in a given locality means that exhibitors or publishers may find it "too burdensome to seek review of the censor's determination." *Freedman*, 380 U.S. at 59. In contrast,

> [t]he license applicant under the [Littleton] scheme ha[s] much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court.

FW/PBS, 493 U.S. at 229 (opinion of O'Connor, J.) Because such an applicant is likely to "stick it out and see litigation through to its end," "[t]he need for a prompt judicial decision is * * * less compelling for licensing ordinances than for censorship schemes." *Boss Capital*, 187 F.3d at 1256. At the same time, it may be that the speaker's powerful (and almost purely) commercial interest in providing the materials that are

available at a sexually oriented business, like the similar incentives underlying commercial speech, means that such expression is hardy enough to survive even if it is accorded diminished constitutional protection.

That observation is especially true of respondent in the circumstances of this case. As we have noted (at pp. 5-6, *supra*), the City has allowed respondent to continue operating its business during the course of the judicial proceedings concerning its entitlement to a license. And the "typical concern" of a business that is operating "is not the speed of court proceedings, but the availability of a stay of adverse action during the pendency of judicial review, however long that review takes." *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 285-286 (2001).

Against this background, First Amendment principles do not require the significant intrusion into state judicial processes that would follow from conditioning the constitutionality of licensing schemes for adult businesses on the guarantee of a prompt judicial decision when license denials are challenged. Because these licensing regimes are "not presumptively invalid" (*FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.)), there is no logical reason to insist that the judgment of the officials administering them be validated by an almost immediate judicial decision.

The practical concern with the difficulty of challenging the censorship of *particular* films that underlay the promptness requirement in *Freedman* is not present here. And the assurance in this case that licensees may obtain access to the courts *prior* to the effectuation of a license cancellation (see Colo. R. Civ. P. 106(a)(4)(V)) means that temporary restraining orders or preliminary injunctions are available to prevent clear cases of abuse on the part of local officials. See *Nightclubs, Inc.*, 202 F.3d at 897 (Meritt, J., dissenting); *Grand Brittain*, 27 F.3d at 1070, 1071. This case therefore calls "for 'treating unlike things differently according to their

differences'" (*Boss Capital*, 187 F.3d at 1256-1257 (citation omitted))—and thus for a departure from *Freedman*'s requirement of a prompt judicial decision.

C. Ordinances Requiring The Licensing Of Sexually Oriented Businesses Should Not Be Treated As Prior Restraints

The considerations discussed above are enough to invalidate the Tenth Circuit's reasoning. But there also is a more fundamental defect in the argument that the *Freedman* requirement of a prompt judicial decision applies here: in our view, challenges to licensing schemes for sexually oriented businesses do not call for the use of prior restraint analysis *at all*.

The Court has treated the state regulation of speech as a prior restraint in cases where officials controlled expression on the basis of its content or had virtually unconstrained discretion to deny speakers a license or permit—situations where the regulation of speech had "the potential for becoming a means of suppressing a particular point of view." *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981). In contrast, the Court subjects limits on speech to the lower level of scrutiny suitable for time, place, and manner restrictions when the State has not

> adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. * * * Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). See, *e.g.*, *Heffron*, 452 U.S. at 649.

It is this latter analysis, suitable for content-neutral regulations, that should govern licensing requirements for sexually oriented businesses. Such regulations plainly serve purposes that are "unrelated to the content of expression" and, because they are directed entirely at nonexpressive conduct (by, for example, limiting ownership of adult businesses by persons with a history of specified regulatory or criminal violations), are "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. As Justice White and Chief Justice Rehnquist noted in their *FW/PBS* dissent, an ordinance like the one in Littleton "does not regulate content and thus it is unlike the content-based prior restraints that the Court has typically scrutinized very closely. * * * [T]here is no basis for invoking *Freedman* procedures to protect against arbitrary use of the discretion conferred by [such an] ordinance." *FW/PBS*, 493 U.S. at 246 (White, J., dissenting).

Indeed, each of the characteristics that recently led the Court to hold the licensing scheme at issue in *Thomas* to be a time, place, and manner regulation also is present here. Like the regulation in *Thomas*—which required the organizers of "large-scale events" in city parks to obtain a permit (534 U.S. at 317-318)—the Littleton ordinance "does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say." *Id.* at 322. As in *Thomas*, the Littleton regulation "(unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to *all* activity conducted in [an adult business]," a large portion of which is wholly unrelated to expression. *Ibid.*[12] "And the object of the [Littleton] permit system (as plainly indicated by the permissible grounds for permit denial) is not

[12] This would be true, for example, of activity at a regulated "adult motel," "sexual encounter establishment," or "nude model studio." See Littleton City Code § 3-14-2.

to exclude communication of a particular content * * *." *Ibid.* Accordingly, as in *Thomas*, in this case "*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation." *Ibid.*

To be sure, the content of speech is relevant to the Littleton ordinance in one sense: the licensing scheme applies only to "adult business[es]" (Littleton City Code § 3-14-3(A)), and such an establishment is identified by whether, among other things wholly unrelated to speech, it exhibits and sells films, books, or periodicals that display any of a predictable list of defined sexual acts or portions of the anatomy. See *id.*, § 3-14-2. In closely related contexts, however, the Court has made clear that such ordinances must be treated as content neutral because they are "aimed not at the content of the films shown at [the adult business], but rather at the secondary effects of such [businesses] on the surrounding community" (*Renton*, 475 U.S. at 47) – and that is so even if disapproval of the business was a subsidiary motivating factor in the enactment of the ordinance. *Ibid.* As the Court has explained, such an "ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* at 48.[13] See also *Alameda Books*, 535

[13] It is the stated purpose of the Littleton regulation "to prevent the deleterious location and concentration of adult businesses within the City, thereby reducing or eliminating the adverse secondary effects from such adult businesses." Littleton City Code § 3-14-1. The City Council adopted the regulation only after holding hearings at which it reviewed evidence "that documented the adverse secondary impacts that adult entertainment establishments have on adjacent and nearby properties" and "heard testimony regarding the deleterious effects that adult entertainment businesses have on surrounding businesses, property values, and crime rates." Pet. App. 41-42.

U.S. at 434, 438-440 (plurality opinion). This type of ordinance is "properly analyzed as a form of time, place, and manner regulation" (*Renton*, 475 U.S. at 48) because it "does not contravene the fundamental principle that underlies [the Court's] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial views.'" *Id.* at 48-49 (citation omitted). See *Pap's A.M.*, 529 U.S. at 292-293 (plurality opinion).

As Justice White noted in *FW/PBS*, this conclusion applies with full force to the licensing of sexually oriented businesses: decisions like *Renton* "make clear * * * that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral." *FW/PBS*, 493 U.S. at 247 (White, J., dissenting). And under the analysis applicable to content-neutral regulations, ordinances like the one in Littleton must be upheld. Licensing decisions under the Littleton ordinance do not turn on the content of the applicant's speech, and the ordinance does not in any way attempt to limit the permissible forms of expression at adult businesses. On its face, the ordinance is instead directed at "prevent[ing] the deleterious location and concentration of adult businesses within the City, thereby reducing or eliminating the adverse secondary effects from such adult businesses." Littleton City Code § 3-14-1. There can be no doubt that this interest in "seek[ing] to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood" (*Pap's A.M.*, 529 U.S. at 293 (plurality opinion)) is a legitimate and important one "'that must be accorded high respect.'" *Renton*, 475 U.S. at 50 (citation omitted). And there has been no suggestion that the ordinance is overbroad, or that its stated purposes are pretextual. See generally *Heffron*, 452 U.S. at 647-655. Settled doctrine therefore establishes the validity of the

ordinance without regard to whether it provides for expedited judicial review—or any of the other accouterments of prior restraint analysis.

We say this with some hesitation, because we recognize that six Justices in *FW/PBS*, writing in two separate opinions, treated the Dallas ordinance there at issue as a species of prior restraint. See 493 U.S. at 225-230 (opinion of O'Connor, J.); *id.* at 238-241 (Brennan, J., concurring in the judgment). See also *Thomas*, 534 U.S. at 322 n.2 (noting that *FW/PBS* "applied two of the *Freedman* requirements"). In our view, however, the issue is one that the Court could appropriately consider anew. Justice O'Connor's lead opinion in *FW/PBS* did not reach the question whether the ordinance was properly viewed "as a content-neutral time, place, and manner restriction" because the opinion concluded that "the city's licensing scheme lacks adequate procedural safeguards." 493 U.S. at 223 (opinion of O'Connor, J.). But the opinion never expressly addressed the threshold question whether there was a proper basis for applying the procedural safeguards designed for prior restraints, and did not respond to the dissenting views of Justice White on this point. Because there is no majority opinion in *FW/PBS*, because the lead opinion did not directly analyze whether the licensing of adult businesses is properly treated as a prior restraint, because the assumption that underlies the outcome in *FW/PBS* is in tension with decisions such as *Renton*, and because treating such licensing systems as prior restraints is not easily squared with the Court's recent holding in *Thomas*, it would be appropriate for the Court to revisit the issue.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 02-1609

In The Supreme Court Of The United States

CITY OF LITTLETON,

Petitioner,

v.

Z. J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a Christal's,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF OHIO AND 14 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), entails a prompt judicial determination or a prompt commencement of judicial proceedings.

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INTEREST OF THE *AMICI* STATES

State and local governments work together to regulate businesses operating within their borders, including adult businesses. A State may enact adult-business regulations itself, or it may authorize local governments to do so.[1] At the same time, it is state statutes or rules of court that govern the process of providing for state court review of adverse licensing decisions made by local governments.

Through whatever means are chosen, States are, to varying degrees, involved in regulating businesses at the local level, and have a strong interest in ensuring the success of that regulation. This is especially true in the area of adult-business regulation aimed at ameliorating the local secondary effects known to result from such businesses, such as crime and urban blight. These problems directly affect the quality of residents' lives, and therefore are the proper concerns of both state and local governments. Further, States have a strong interest in protecting their courts from undue interference with docket management, not to mention an interest in avoiding the separation-of-power problems that mandated judicial-decision deadlines present. Consequently, the *amici* States are concerned about the imposition of unwarranted court-decision deadlines that could strain scarce judicial resources and threaten the integrity of the judicial deliberation process.

The *amici* States therefore wish to add our voices to this discussion of whether an adult-business licensing scheme that is otherwise constitutional must provide for a speedy judicial determination with respect to adverse administrative

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[1] *See, e.g.*, Ohio Revised Code §§ 503.51, *et seq.* (enabling legislation allowing townships to regulate "adult cabarets"); Tennessee Code §§ 7-51-1121, *et seq.* (enabling legislation for counties to regulate "adult-oriented establishments"); 24 Delaware Code §§ 1601, *et seq.* (statewide regulation of "adult entertainment establishments").

licensing decisions. We ask this Court to reverse the court of appeals and hold that the First Amendment is satisfied by prompt access to court to review such decisions.

SUMMARY OF ARGUMENT

State and local governments have substantial interests in combating the harmful secondary effects, such as crime and urban blight, that adult businesses are known to cause. The Court has upheld certain adult-business regulations, distinguishing them from censorship schemes and subjecting them only to intermediate scrutiny under the First Amendment, as long as they were aimed at the secondary effects of those businesses. Adult-business licensing schemes like Littleton's—likewise aimed only at secondary effects—should be accorded the same treatment.

The Court has applied different standards to prior-restraint censorship schemes than to regulations, such as those here, geared toward eradicating secondary effects of adult businesses. Thus, when faced with content-based censorship schemes, the Court has declared them presumptively unconstitutional because of the grave danger that constitutionally-protected speech will be wrongfully suppressed, and applied strict standards to ensure the protection of free speech rights. For example, this Court, in *Freedman v. Maryland*, 380 U.S. 51 (1965), held that certain safeguards must accompany a content-based film censorship scheme to satisfy the First Amendment, and placed on the government the entire burden of proving the validity of an adverse decision.

But in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), Justice O'Connor's opinion concluded that an adult-business licensing scheme—involving nondiscretionary decision-making based on objective criteria developed to ameliorate negative secondary effects of adult businesses—merited

lesser scrutiny, as it did not present a serious danger of censorship and thus was not presumptively unconstitutional. *See id.* at 223-230 (principal opinion of O'Connor, J.). The opinion determined that such a scheme must merely assure a timely administrative decision and provide for "the possibility of prompt judicial review." *See id.* at 228.

The *amici* States submit that prompt *access* to court satisfies the "prompt judicial review" requirement in this context. Littleton's licensing scheme, like the Dallas scheme at issue in *FW/PBS*, is more like a zoning ordinance than a censorship scheme. Because this type of licensing scheme is not content-based, the danger of unconstitutional suppression of speech is slight, and the businesses do not need the type of protection mandated by *Freedman*. Instead, businesses receive all of the safeguards they need when the scheme imposes reasonable time limits on administrative decisions and provides for prompt access to court review. Indeed, since the criteria in the schemes are objective and ministerially applied, even to the extent that erroneous licensing decisions might cause constitutional harm, the applicant could readily demonstrate that error to a court and obtain an injunction or other temporary relief pending review if necessary.

Conversely, imposing a requirement of a speedy judicial *decision* would significantly impede governments' ability to address the secondary effects of adult businesses. Imposing court deadlines raises serious separation-of-powers problems, and the only alternative is to suffer the secondary effects these businesses cause, either temporarily or permanently. Because the licensing criteria will render content-based decisions highly unlikely, however, these costs are imposed for no reason—the businesses' First Amendment rights are already sufficiently protected. Accordingly, there is simply no basis for imposing a speedy-judicial-decision requirement on these licensing schemes.

The *amici* States, then, argue first and foremost that there should be no speedy-judicial-decision requirement imposed at all. If, however, this Court decides otherwise, then the *amici* States urge the Court not to foreclose the possibility that provisional licenses or the equivalent while review is pending are a constitutionally-adequate substitute for speedy judicial determination. These temporary licenses fully safeguard First Amendment rights because, if no speech is suppressed pending review, no unconstitutional censorship can possibly occur.

ARGUMENT

I. The First Amendment Does Not Require That An Otherwise Constitutional Content-Neutral Licensing Scheme For Adult Businesses Guarantee A Speedy Judicial Decision.

A. The Court has recognized that governments may regulate adult businesses in order to ameliorate the secondary effects of those businesses.

It is common knowledge that certain undesirable secondary effects, such as increased crime and decreased property values in surrounding areas, tend to accompany adult businesses. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (citing the "admittedly serious problems" that arise in conjunction with adult businesses) (quoting *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)); *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring) ("Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood"); *Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality opinion) (holding it reasonable for a city to

rely on the evidence in *Young* and *Renton* "to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood").

It is likewise well-established that there is a substantial governmental interest in regulating adult businesses in an effort to ameliorate those secondary effects. *See Renton*, 475 U.S. at 50 (interests in combating negative secondary effects of adult businesses to preserve urban quality of life are "vital governmental interests" that deserve "high respect") (quoting *Young*, 427 U.S. at 71 (plurality opinion)); *Erie*, 529 U.S. at 296-97 (plurality opinion) (government interests in combating the "harmful secondary effects" associated with adult entertainment establishments is "undeniably important); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 244 (1990) (White, J., and Rehnquist, C.J., concurring in part and dissenting in part) ("[T]here is a substantial governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them") (citing *Renton* and *Young*); *Alameda Books*, 535 U.S. at 435-36 (plurality opinion) (substantial government interest in reducing crime permits a city to regulate adult businesses in ways that evidence reasonably indicates will reduce crime).

Although regulations directed at the *content* of speech are subject to strict scrutiny under the First Amendment, this Court has held that regulations aimed at the *secondary effects* of adult businesses are subject only to intermediate scrutiny. For example, this Court has applied intermediate scrutiny to zoning regulations and regulations prohibiting certain conduct, and upheld them. *See, e.g., Alameda Books*, 535 U.S. at 433-443 (plurality opinion); *id.* at 445 (Kennedy, J., concurring); *Renton*, 475 U.S. at 46-50, 54; *Erie*, 529 U.S. at 289-302 (plurality opinion). As shown below, (1) the secondary-effects framework—rather than a prior restraint

analysis—applies to licensing schemes like Littleton's, and (2) accordingly, the *Freedman* requirement of a speedy judicial decision does not properly apply to them.

B. An adult-business licensing scheme aimed at secondary effects is not a content-based censorship scheme; thus, it need not meet the same standards as a censorship scheme.

Content-based censorship schemes, which are prior restraints aimed at suppressing classes of unprotected speech (such as obscenity), are presumed unconstitutional because of the grave danger that governmental actors will use the schemes to wrongfully suppress constitutionally-protected speech that they deem undesirable. *See generally FW/PBS*, 493 U.S. at 225-26, 229 (principal opinion of O'Connor, J.); *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) (presumption against prior restraints exists because "the risks of freewheeling censorship are formidable"). For that reason, in *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that certain procedural safeguards must accompany a content-based film censorship scheme, including the guarantee of a speedy judicial determination following an adverse administrative decision. *See id.* at 59; *City News and Novelty, Inc. v. Waukesha*, 531 U.S. 278, 280-81 (2001).

In fact, *Freedman* placed the entire burden on the government to demonstrate the propriety of its censorship. Of course, this approach makes sense in the context of an administrative decision that is *presumptively unconstitutional*. *See FW/PBS*, 493 U.S. at 225, 229 (opinion of O'Connor, J.). According to *Freedman*, a government is required to make a quick (presumptively-invalid) administrative decision itself, then institute court proceedings and there prove the validity of its

(presumptively-invalid) decision, and then make sure that the judicial determination is issued promptly. *See id.* at 58-60. The *Freedman* requirements work together to make sure that, when a government enacts laws designed to allow suppression of speech based on content, it bears the entire burden of justifying that suppression.

But adult-business licensing schemes like Littleton's do not present a similar danger of censorship, because they involve nondiscretionary decisionmaking based on objectively-determinable criteria developed for the purpose of ameliorating the negative secondary effects of adult businesses. *See FW/PBS*, 493 U.S. at 228-29 (opinion of O'Connor, J.).[2] Nondiscretionary regulatory schemes aimed at the secondary effects of adult businesses—even though they apply to only one particular class of businesses—provide "less reason to be concerned that [governments] will use these [regulations] to discriminate against unpopular speech." *See Alameda Books*, 535 U.S. at 440 (plurality opinion).

The Littleton licensing scheme applies only routine, objective criteria to applicants, leaving no room for discretion on the part of agency officials. For example, under the Littleton scheme, a license application may be denied only if the applicant is under age 18; has provided false information in connection with the application; owns, operates, or is an adult business that has lost its adult-

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[2] Justices Stevens and Kennedy joined Justice O'Connor's opinion on the question of *Freedman's* application. Justices Brennan, Marshall, and Blackmun concurred in the judgment but would have applied all of the *Freedman* safeguards (*see FW/PBS*, 493 U.S. at 238-39 (Brennan, J., concurring in the judgment)), whereas Justices White and Rehnquist (*see id.* at 244 (opinion of White, J.)) and Scalia (*see id.* at 250-264 (opinion of Scalia, J.)) would not have applied any of the *Freedman* safeguards.

business license in the state within the past year; has operated an adult business found to be a public nuisance in the state within the past year; is a corporation not in good standing or authorized to do business in the state; owes taxes, fees, fines, or penalties assessed in relation to an adult business; does not have a required sales tax license; or has been convicted of specified sex crimes or crimes connected with another adult business within the past five years. *See* Littleton City Code (hereinafter "LCC") Sections 3-14-8 and 3-14-2, reprinted in Petitioner's Brief at Br. App. 28a-30a and 12a-20a, respectively. For another example of an adult-business licensing scheme that properly curtails the discretion of local officials, *see* Union Township, Ohio, Resolution 00-22(F)(2), reprinted at http://www.union-township.oh.us/Resources /Resolution%2000-22.pdf.[3]

Criteria such as these have nothing to do with the content of any speech, and whether an applicant meets them is objectively determinable. This contrasts sharply with schemes that do allow for discretion, such as the ordinance struck down in *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), which gave the mayor "unfettered discretion" to deny newsrack-placement permits and "unbounded authority" to place additional conditions on granted permits, *see id.* at 772. It is hard to imagine how, under the Littleton ordinance, an agency official would manufacture an applicant's underage status or a tax debt or a sex-crime conviction in order to deny a license application.

The lack of a true nexus between these adult-business licensing schemes and speech content is further evidenced by the fact that the schemes do not target only "adult speech"

[3] Resolution 00-22 is currently at issue in *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791, 800 (6th Cir. 2003), *rehearing granted and opinion vacated* (Aug. 1, 2003).

businesses, but also adult businesses that do not engage in expressive activity. For example, Littleton's licensing requirements apply to adult motels and "sexual encounter establishments."[4] *See* LCC Sections 3-14-2 and 3-14-4, reprinted in Petitioner's Brief at Br. App. 12a-20a and 23a. Similar ordinances across the country likewise apply (or have applied) to non-expressive adult businesses. *See, e.g., FW/PBS*, 493 U.S. at 220 (applied to adult motels, sexual encounter centers, and escort agencies); *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1277 n.1 (10th Cir. 2002) (applied to adult motels and sexual encounter establishments); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1257-59 (11th Cir. 1999) (applied to adult motels); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1368 (11th Cir. 1999) (applied to escort agencies); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 222 n.2 (6th Cir. 1995) (applied to adult motels, escort agencies, and sexual encounter centers). Any suppression of speech is incidental to the permissible fulfillment of a government objective that is wholly content-neutral: ameliorating the secondary effects known to be caused by a class of businesses, regardless of whether those businesses are expressive.

[4] "Sexual encounter establishment" is defined in the Littleton ordinance as a "business or commercial establishment, that as one of its primary business purposes, offers, for any form of consideration, a place where two (2) or more persons may congregate, associate, or consort for the purpose of 'specified sexual activities' or the exposure of 'specified anatomical areas' or activities when one or more of the persons is in a state of nudity or seminude." An adult motel is not included in this definition merely "by virtue of the fact that it offers private rooms for rent." *See* LCC Section 3-14-2, reprinted in Petitioner's Brief at Br. App. 12a-20a.

Such schemes, because they involve virtually no danger of censorship, are properly held to lesser scrutiny than censorship schemes. This is true whether or not these schemes are labeled "content-neutral." *See, e.g., Renton,* 475 U.S. at 47-48 (an adult-business zoning ordinance aimed not at content but at secondary effects is "completely consistent with [this Court's] definition of 'content-neutral' speech regulations"); *Alameda Books*, 535 U.S. at 440-41 (plurality opinion) (distinction between content-neutral and content-based regulation of adult speech rests on whether the regulations are motivated primarily by speech content or by its secondary effects); *id.* at 448-49 (Kennedy, J., concurring) (zoning regulations applicable only to adult businesses are content-based, but should be subject to the same scrutiny as are content-neutral regulations because of their "prima facie legitimate purpose" of decreasing secondary effects and not speech); *Erie*, 529 U.S. at 295-96 (plurality opinion) (scrutinizing ban on nude dancing as content-neutral because it was enacted to combat secondary effects of adult entertainment businesses rather than to suppress a message). However denominated, the lower risk such schemes present justifies reduced judicial oversight.

Nor can respondents raise the specter of "prior restraint" in order to justify heightened review. Because these ministerial licensing schemes are not designed to—and do not—suppress speech on the basis of its content, they are not "prior restraints" as this Court has used that term. Under this Court's jurisprudence, this latter term is limited to those regimes that include content-based decisionmaking by officials using discretionary judgment. *See Southeastern Promotions*, 420 U.S. at 554. And it is these characteristics—content review and broad discretion—that render censorship schemes like the one in *Freedman* subject to stricter scrutiny. Their absence here justifies the application of intermediate scrutiny—a form of oversight that

strikes a reasonable balance between the slight risks of censorship and the substantial governmental interests in combating secondary effects.

C. Prompt access to court, rather than *Freedman*'s speedy-judicial-determination requirement, suffices to protect the First Amendment interests of adult businesses.

Decisions made under non-content-directed licensing schemes are presumptively valid, *see FW/PBS*, 493 U.S. at 229 (opinion of O'Connor, J.), and so it is unnecessary—and, in fact, improper—to place the entire burden of justification on the government. In accordance with this understanding of the differences between the licensing scheme in *FW/PBS* and the censorship scheme in *Freedman*, Justice O'Connor's opinion in *FW/PBS* properly concluded that the licensing scheme at issue merited application of only "some of the *Freedman* standards." *Waukesha*, 531 U.S. at 281. The scheme need not, for example, place on the government the burden of seeking judicial review and the burden of proof in court. *FW/PBS*, 493 U.S. at 230 (opinion of O'Connor, J.). But it must provide that the administrative decisionmaking happens in a reasonably brief period of time. *Id.* at 228. And it must ensure "the possibility of prompt judicial review." *Id.*[5]

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[5] The *amici* States note that Littleton's current licensing scheme satisfies the administrative-delay prong of *Freedman* and *FW/PBS*. *See* LCC Section 3-14-8, reprinted in Petitioner's Brief at Br. App. 28a-30a (final administrative decision guaranteed within 40 days of application date). This brief also assumes that the Littleton ordinance satisfies the test set forth in *Renton* for determining whether a regulation applicable only to adult businesses is a valid time, place and manner restriction designed to reduce the secondary effects arising out of such businesses. *See id.*, 475 U.S. at 47-50. As in *FW/PBS*, 493 U.S. at 223 (opinion of O'Connor, J.), the Court need not reach that issue.

In *FW/PBS*, this Court did not need to decide exactly how "prompt judicial review" would be accomplished in the licensing context. Instead, Justice O'Connor's opinion extensively discussed the failure of the scheme at issue to provide adequate time limits to ensure sufficiently prompt administrative decisions. *See id.* at 226-29. After setting out in general terms the standards to be applied to the licensing scheme, and describing the scheme's failure on the administrative-delay prong of *Freedman*, the opinion added only the bare statement that the scheme also failed to "provide an avenue for prompt judicial review." *See id.* at 229. Given this conclusion, there was no need to elucidate the specific contours of "prompt judicial review" in the context of a non-content-directed licensing scheme. The *amici* States submit that prompt access to court would satisfy the First Amendment.

A licensing scheme such as Littleton's—which targets secondary effects of adult businesses, expressive and non-expressive alike, employs objective criteria that leave no meaningful discretion in the hands of government officials or agencies, provides for timely administrative decisions, and provides for direct and prompt review of those decisions[6]—has much more in common with adult-business zoning ordinances like the one upheld in *Renton* than it does with a *Freedman*-like censorship scheme. It is presumptively valid, and it must not be sacrificed too easily in the name of the free speech rights of businesses known to cause serious harm to the surrounding community.

Instead, the governmental interest in protecting property, reducing crime, and generally maintaining or improving the quality of life of residents must be balanced

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[6] *See* LCC Sections 3-14-8(B)(3), reprinted in Petitioner's Brief at Br. App. 30a.

against the risks to First Amendment rights of the regulated businesses. And, the opportunity for censorship, the only First Amendment harm at issue, is vanishingly slight where, as here, the licensing decisions are based on objective, non-content-based criteria. Consequently, the affected businesses do not need the level of protection offered by *Freedman*, whose standards were developed specifically for content-based censorship schemes. Conversely, the governmental interest in fighting secondary effects of adult businesses is great, and a government must be allowed to implement a licensing scheme aimed at those effects without procedural requirements that will tend to undermine the effectiveness—or threaten the very existence of—the scheme. In the case of the above-described type of licensing scheme, a fair balancing occurs when the scheme provides for reasonable time limits on administrative decisions and a way for businesses to obtain prompt access to court review if they so desire.

The danger that local officials might use a licensing program like Littleton's to interfere with any adult business's expressive rights is no greater than that same danger in relation to any law of general applicability, such as a tax law or a fire code provision. And these latter laws, of course, are not subject to strict judicial scrutiny merely because they are applied to an adult business. *See generally U.S. v. O'Brien*, 391 U.S. 367 (1968) (facially speech-neutral law prohibiting certain conduct only incidentally affected speech and thus was subject only to intermediate scrutiny); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (First Amendment not implicated by closure of adult bookstore pursuant to generally-applicable, facially speech-neutral public health regulation). There is no reason to impose such scrutiny on the ministerial licensing decisions here. In fact, the only true potential harm the regulations present—which is not even a First Amendment danger—is the possibility of erroneous licensing decisions. And given that the regulations provide

for ministerial decisions based on content-neutral criteria—at least in the type of licensing schemes that the *amici* States are here discussing—applicants who are wronged should have little difficulty demonstrating that error to a court, and even obtaining interim relief while review is pending.

D. Requiring a guarantee of speedy judicial determination would significantly impede the ability of state and local governments to address the secondary effects of adult businesses.

As noted above, state and local governments have strong—and wholly legitimate—interests in preventing or diminishing the negative secondary effects associated with adult businesses, including crime and neighborhood deterioration. Governments may constitutionally effectuate those interests by enacting laws aimed precisely at those secondary effects. They do so most effectively (and most lawfully) when they single out adult businesses as a class. *See, e.g., Renton*, 475 U.S. at 52 (praising Renton's narrowly-tailored classification to affect only the businesses producing the unwanted secondary effects).

Making a speedy-judicial-determination guarantee a condition of court approval of otherwise constitutional licensing schemes, however, places the governments in a difficult position, and presents substantial separation-of-powers problems. First, States will have to decide whether to attempt to impose expedited-ruling laws on courts deciding adult-business license issues, to the detriment of other cases on the dockets that may be even more pressing but that will not get such special treatment. There will doubtless be other pending cases involving claims of constitutional violations—and some of those will certainly be First Amendment claims, such as time-place-manner disputes. Since censorship is such a remote possibility with respect to nondiscretionary,

non-content-directed licensing schemes, there is no sound basis for giving special, expedited treatment to these adult business licensing decisions by thrusting them to the front of the line when everyone else must wait his or her turn.

Second, as some courts have recognized, state legislatures run afoul of separation-of-powers principles when they attempt to impose court decisionmaking deadlines. *See, e.g., Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000) (rejecting state legislature's imposition of deadlines for postconviction motions as violation of separation of powers under state constitution); *Complaint Against Grady*, 348 N.W.2d 559 (Wisc. 1984) (holding state statute imposing deadlines for judicial decisionmaking to be violation of separation of powers under state constitution); *Coate v. Omholt*, 662 P.2d 591 (Mont. 1983) (same).

If speedy-decision laws are rejected by state courts, or a State decides it cannot in good faith enact such laws, local governments are left with two options: offering provisional licenses or stays, and thus suffering the secondary effects while appeals by non-qualified adult businesses are decided, or abandoning altogether the adult-business licensing scheme and thus forgoing perhaps the best method available for minimizing secondary effects. But there is no sound basis for imposing the speedy-decision requirement in the first place. Given the non-discretionary, non-content-based nature of the criteria these otherwise constitutional licensing schemes employ, the possibility of content-based decisionmaking is virtually non-existent, and an adult business's First Amendment rights are thus already sufficiently protected from the risk of censorship.

II. In The Alternative, If Assurance Of A Speedy Judicial Determination Is Required, The Court Should Recognize That Provisional Licenses (Or The Equivalent) Pending Completion Of The First Level Of Judicial Review Will Alleviate Any First Amendment Concerns.

If this Court nonetheless concludes that the *Freedman* speedy-judicial-determination requirement applies in the adult-business licensing context, the Court should also recognize that allowing a business to operate pending judicial review is an acceptable alternative to a guaranteed speedy judicial determination. As the Court recently noted, the "typical concern" of a business already operating but facing loss of a license is "not the speed of court proceedings, but the availability of a stay of adverse action during the pendency of judicial review, however long that review takes." *Waukesha*, 531 U.S. at 285-86 (also noting that "[s]wift judicial review is the remedy needed by those held back from speaking"). *See also National Socialist Party of America v. Village of Skokie*, 423 U.S. 43, 44 (1977) (holding that, absent "immediate appellate review" under *Freedman*, government "must instead allow a stay"). Allowing the business to continue operating fully addresses this "typical concern."

The only potential constitutional evil lurking in these situations is the wrongful suppression of speech. If no speech is suppressed pending judicial review, however, then a business's First Amendment rights cannot possibly be unconstitutionally burdened. An adult business may proceed with its plans to open (in the case of a license denial) or may continue to operate (if a license has been nonrenewed) until a judicial decision is rendered. No reason will exist to upset a court's normal docket management or force the parties to litigate at an accelerated (and thus perhaps more costly) pace.

The Court should provide guidance on this issue, should the speedy-judicial-decision standard be imposed. At least one circuit court has concluded that the uncertainty during the judicial review process—even with a provisional license—will be "chilling" to the affected business operators. *See Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791, 800 (6th Cir. 2003), *rehearing granted and opinion vacated* (Aug. 1, 2003).[7] Temporary permits in lieu of fast judicial decisions, however, are unlikely to deter owners from applying for licenses or license renewals, given their stakes in their businesses. *See FW/PBS*, 493 U.S. 229-30 (opinion of O'Connor, J.). In fact, Respondent itself advocates this result. *See* Brief in Opposition 13-14.

Nor can one buttress the First Amendment claim by asserting that the rights under the license are too uncertain because the license is only temporary and lasts only during the pendency of judicial review. Any such uncertainty is minimal, and largely remediable by business owners themselves. Where a licensing scheme is aimed only at secondary effects of adult businesses, allows for no significant discretion on the part of the decisionmaker, and involves known, objectively-determinable licensing criteria, a business owner should have little difficulty ascertaining the likelihood that his application will be granted. In light of this, the only "uncertainty" that an adult business could claim is economic uncertainty in the face of pending litigation. But business uncertainty is not a First Amendment concern in and of itself. "The inquiry for First Amendment purposes is not

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[7] *But see 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (automatic stay pending appeal would be constitutionally acceptable); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 1001 n.18 (4th Cir. 1995) (en banc) (constitutional problem avoided if adult bookstore permitted to operate pending appeal), *cert. denied*, 516 U.S. 1010.

concerned with economic impact." *See Renton*, 475 U.S. at 54 (quoting *Young*, 427 U.S. at 78). The First Amendment is concerned with expressive conduct, not business uncertainty, and those who hold a provisional license are entirely free to engage in their desired form of such conduct.

In sum, if the Court decides that an adult-business licensing scheme must provide for speedy judicial determination of challenges to adverse licensing decisions, it should also make clear that any means whereby the effect of an adverse decision is postponed until judicial review is completed—meaning that an adult business may engage in expressive conduct as if it had received a favorable decision—obviates the need for a court to rush to judgment on a licensing decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 02-1609

In the Supreme Court of the United States

CITY OF LITTLETON,

Petitioner,

v.

Z.J. GIFTS D-4, LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF COMMUNITY DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) entails a prompt judicial determination or a prompt commencement of judicial proceedings.

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INTEREST OF *AMICUS CURIAE*

Community Defense Counsel ("CDC") is a nonprofit legal and educational organization that serves land use planners, local elected officials and municipal attorneys in the area of adult business regulation.[1] CDC services the public interest through training seminars, legal resources, and litigation services. CDC has drafted hundreds of sexually oriented business ordinances for municipalities across the country.

The crime, blight, and spread of disease caused by sexually oriented businesses are an ongoing concern for the local governments CDC serves. A narrowly tailored, content-neutral regulation furthers the substantial government interest of preventing such harmful effects. As *Amicus Curiae*, CDC's expertise will assist this Court in analyzing the relevant case law regarding this important case. CDC files this brief in support of Petitioner, and urges this Court to reverse the holding of the Court of Appeals.

SUMMARY OF ARGUMENT

This Court's unanimous decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), rather than its decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), controls the outcome of this case. In *Thomas*, the Court held that a content-neutral time, place and manner permit scheme that contains narrow, objective and definite standards to guide the decisionmaker, and which limits the time in which the

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[1] No counsel for a party authored any part of this Brief. A monetary contribution for the preparation of this Brief was received from the Law & Liberty Institute. The written consent of all parties to the filing of this Brief has been filed with the Clerk of this Court.

decisionmaker must issue a permit, is not an unconstitutional prior restraint if it provides for effective judicial review. *FW/PBS*, on the other hand, involved a sexually oriented business licensing scheme that afforded unbridled discretion to the licensing official to withhold issuance of a license, and was thus an unconstitutional prior restraint and therefore appropriately subject to more stringent safeguards.

The City of Littleton's ordinance is for all relevant purposes herein identical to the ordinance in *Thomas*. It is content-neutral, affords minimal discretion to the licensing official, mandates the issuance or denial of a license within a brief and specified period of time and affords effective judicial review. Accordingly, Littleton's ordinance does not constitute a prior restraint and is not subject to the "prompt judicial review" safeguard as required by *FW/PBS*. Because the Littleton ordinance is distinct from the ordinance in *FW/PBS*, and due to the direct applicability of *Thomas* to this case, whether *FW/PBS* imposes a requirement for prompt judicial access or a prompt judicial determination is not appropriately decided by the Court in this instance.

If, however, the Court determines that the modified *Freedman* safeguards announced in *FW/PBS* govern the outcome of this case, and further determines that those safeguards require a prompt judicial *determination*, the Court should announce a rule of procedural due process that is binding on lower courts and requires reviewing judges to dispose of appeals from local administrative licensing decisions in a timely fashion. Such supervision of the administration of justice by the courts protects the rights of all the parties without subjecting local ordinances to successful facial challenges or requiring the enactment of new state statutes.

ARGUMENT

I. A CONTENT-NEUTRAL LICENSING SCHEME THAT CONTAINS NARROW, OBJECTIVE AND DEFINITE STANDARDS TO CONTROL THE LICENSING OFFICIAL IS NOT A PRIOR RESTRAINT AND MUST ONLY BE SUBJECT TO EFFECTIVE JUDICIAL REVIEW (*I.E.*, ACCESS TO A JUDICIAL FORUM) TO SATISFY FIRST AMENDMENT SCRUTINY.

A. This Court's decision in *Thomas* is controlling.

The answer to the question presented in this case is governed by this Court's decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). *Thomas* addressed a Chicago Park District ordinance that required a permit in order to "conduct a public assembly, parade, picnic, or other event involving more than fifty individuals." *Id.* at 318. The ordinance was challenged by an organization that on several occasions had been denied a permit to hold rallies advocating the legalization of marijuana. *Id.* at 319-320.

On review, this Court held that the procedural requirements it had previously established in *Freedman v. Maryland*, 380 U.S. 51 (1965), do not apply to a permit or licensing scheme that does not condition expression on a licensing body's approval of content. *Thomas*, 534 U.S. at 321-22 ("*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum."). Justice Scalia, writing for the unanimous Court, issued a lucid opinion detailing the meaning and history of the prior restraint doctrine, which dates back to the English printing press licensing systems. The opinion notes

"the memory of its abuses" that caused Blackstone to warn "against the 'restrictive power' of such a 'licenser'—an administrative official who enjoyed unconfined authority to pass judgment on the content of speech." *Id.* at 320 (quoting 4 W. Blackstone, Commentaries on the Laws of England 152 (1769)).

Paying heed to Blackstone's warning, the unanimous Court reiterated the importance of preventing the unbridled discretion of a licensing official, underscoring the necessity of definite standards to guide that official in his decision-making process, even when implementing a content-neutral permit scheme. *Id.* at 323.

Most notably, the Court rejected the petitioners' argument that the Park District ordinance "*must specify a deadline for judicial review of a challenge to a permit denial*," *id.* at 322 (emphasis added). Rather, the Court held that such content-neutral permit schemes must only be subject to "effective judicial review" in order to withstand First Amendment scrutiny.

The City of Littleton's ordinance, although distinct in its regulatory focus, is—for purposes of the analysis herein—identical to the Chicago Park District ordinance in *Thomas*. Both ordinances (i) are content neutral, (ii) are directed at communicative and non-communicative activity[2], (iii) contain

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[2] See *Thomas*, *supra*, at 322 ("Indeed, the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to all activity conducted in a public park."); and Pet. App. 83a-88a (City of Littleton Code (CLC) § 3-14-1, regulating some businesses that do engage in protected speech, such as adult bookstores, and others that do not, such as sexual encounter establishments).

narrow, objective and definite standards to guide the decisionmaker in issuing or denying a license[3], (iv) ensure that a decision granting or denying a permit will be made in a brief, specified period of time[4], and (v) provide for effective judicial review.[5] Moreover, like the ordinance upheld in *Thomas*, Littleton's licensing ordinance "does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say." *Id.*

The Court of Appeals cavalierly dismisses the importance of the "unbridled discretion" factor in its analysis of the Littleton ordinance. Pet. App. 31a. Despite its explicit acknowledgment that the licensing official has "little or no discretion in reviewing an application," the Court of Appeals held that sexually oriented business licensing schemes are to be accorded special treatment, due to the unwarranted

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[3] See *Thomas*, *supra*, at 324 (the Park District ordinance "provide[s] 'narrowly drawn, reasonable and definite standards' to guide the licensor's determination.") (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)); and Pet. App. 64a-65a (holding that Littleton licensing ordinance, which "identifies eight specific reasons" for which a license application must be denied, does not afford unbridled discretion to the city clerk to approve or deny a license application).

[4] See *Thomas*, *supra*, at 324 ("the Park District must process applications within 28 days."); and Pet. App. 24a-25a (holding that unconstitutional provisions of Littleton ordinance allowing for undue delay are severable).

[5] See *Thomas*, *supra*, at 324 (permit denial subject to judicial review by writ of common-law certiorari in the Illinois courts); and Pet. App. 97a (final licensing decision subject to appeal pursuant to Colorado Rule of Civil Procedure 106(a)(4)).

concern that licensing officials "may be tempted [] to overstep the bounds of the ordinance." *Id.*

That concern, of course, was flatly rejected by this Court in *Thomas*:

> Petitioners contend that the ... ordinance ... allows the Park District to waive the permit requirements for some favored speakers, which insisting upon them for others. That is certainly not the intent of the ordinance. *** Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if an when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements.

Id. at 324-25. Rather than have a special test for content-neutral sexually oriented business licensing schemes—as posited by the Court of Appeals—the better test is the one followed in *Thomas*: if the licensing scheme is content neutral and does not afford unbridled discretion (which includes undue delay[6]), then it is not a prior restraint and is constitutional, as long as effective judicial review is available.

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[6] See *FW/PBS*, *supra*, at 226-27 ("The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating excessive administrative discretion."); *id.* at 223 (the failure to place limitations on the time within which a licensing official must make a decision whether to grant or deny a license "is a species of unbridled discretion.") (citing *Freedman*, at 56-67).

B. *FW/PBS* is not applicable to the present facts in light of this Court's subsequent decision in *Thomas*.

Although the question presented herein asks whether the prompt judicial review requirement imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) means prompt judicial determination or prompt commencement of judicial proceedings, *FW/PBS* is not directly applicable. Thus, the plurality's intended meaning of "prompt judicial review" in that case need not be ascertained under the present facts.

The Dallas ordinance in *FW/PBS*, unlike the Chicago Park District and Littleton ordinances, constituted a prior restraint because it afforded unbridled discretion to the licensing official to delay the issuance of a license, and thus suppress the applicant's speech. See *id.*, 493 U.S. at 226 ("an ordinance ... requiring a permit or license which may be granted or withheld in the discretion of [a licensing] official is an unconstitutional censorship or prior restraint."). In light of *Thomas*, *FW/PBS* cannot be properly interpreted to classify all content-neutral licensing schemes as prior restraints subject to the modified *Freedman* test announced in *FW/PBS*. Indeed, the park permit scheme in *Thomas* was not a "prior restraint" and, as such, the *Freedman* safeguards were not applicable. Similarly, the Littleton ordinance also is not a prior restraint, and thus should not be subject to *Freedman* or *FW/PBS*.

The critical distinction between the ordinance at issue in *FW/PBS* and the Chicago park district ordinance in *Thomas* is not that the former is a sexually oriented business licensing ordinance and the latter requires park permits. Rather, the critical difference is that the *Thomas* ordinance did not afford unbridled discretion to the decisionmaker, while the Dallas ordinance in *FW/PBS* did. For that reason, the Littleton ordinance, which also does not afford unbridled discretion to

the licensing official, must be sustained as long as "effective judicial review" is available. *Thomas*, *supra*, at 323.

As discussed above, the Court of Appeals held that the *FW/PBS* plurality created a special prior restraint test for application to sexually oriented business licensing schemes only. Pet. App. 31a (citing *Thomas*, 534 U.S. at 322, n.2). Assuming *arguendo* that this is an accurate reading of *FW/PBS*, that decision may still be harmonized with *Thomas* if the Court determines that by "prompt judicial review" the *FW/PBS* plurality intended only to require the possibility for prompt commencement of judicial proceedings, rather than prompt judicial determination. In that circumstance, there is very little practical distinction between *FW/PBS* and *Thomas*. Under either circumstance, the licensing scheme must not afford unbridled discretion (including undue delay), and must afford judicial review. The only difference, ironically, is that the sexually oriented business would be accorded more favorable treatment ("*prompt* judicial review") than political and other highly valued speech (for which only "*effective* judicial review" is required).

It is of no concern, however, because *FW/PBS* did not announce a special test to be applied only to sexually oriented businesses. In Part II of the plurality opinion, there is no discussion of sexually oriented business licensing schemes in particular, such that a distinction from other licensing schemes reasonably may be drawn. Rather, the plurality consistently references the more generic "licensing scheme" throughout that entire section of the opinion.[7] While one

[7] Numerous lower courts have applied *FW/PBS* in non-sexually oriented business contexts which, while not conclusive of the point argued, is indicative of a similar understanding.

might argue that the facts of the case determine the applicability and parameters of the standard enunciated, even if that erroneous hermeneutic is followed in this instance, then the modified *Freedman* safeguards announced in *FW/PBS* would only be applicable to sexually oriented business licensing schemes *that do not limit the time within which the decisionmaker must make a decision whether to grant or deny a license*.[8] Because the Littleton ordinance does not suffer from that defect, *FW/PBS* is not applicable, and the ordinance should be analyzed—and sustained—under *Thomas*.

II. IF THIS COURT CONCLUDES THAT A PROMPT JUDICIAL DETERMINATION IS MANDATED IN ORDER TO SUSTAIN A SEXUALLY ORIENTED BUSINESS LICENSING SCHEME, *AMICUS* URGES THE COURT TO ANNOUNCE A RULE OF PROCEDURAL DUE PROCESS TO INSTRUCT THE LOWER COURTS HOW TO HEAR AND DISPOSE OF LICENSING APPEALS IN A PROMPT AND EXPEDITED MANNER.

If this Court determines that a prompt judicial decision is required in order to satisfy the procedural safeguards specially created for sexually oriented business licensing schemes, such an interpretation will pose great problems for municipalities. See *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000). Indeed, it would be an unwise exercise of the

[8] *Freedman*, for the reasons expressed in *Thomas*, is not applicable to content-neutral licensing schemes like the Littleton ordinance, even if such schemes "[largely] target[] businesses purveying sexually explicit speech." *Thomas*, at 323, n.2 (quoting *FW/PBS* at 224). There is simply no legitimate justification for extending special treatment to sexually oriented businesses, nor was any offered in *FW/PBS*.

supervisory powers of the Court to announce a judicially imposed rule of procedure that cannot be accommodated by municipalities attempting to ameliorate the negative secondary effects of sexually oriented businesses. The procedural rule should be directed to the reviewing court, without striking the sexually oriented business licensing ordinance on its face.

Moreover, in the event this Court determines that a specific time period is required, your *Amicus* urges the Court to instruct states and cities how they might comply.

The most effective and least burdensome proposition would be for the Court to implement a rule of procedural due process that would require state courts to render a speedy ruling within a time period this Court determines is reasonable. This would significantly aid municipalities and relieve them of the onerous burden of having to forgo enacting and enforcing local sexually oriented business regulations until a state legislature either amends an existing statute or adopts a new one. This method of construing a statute to provide procedural due process was adopted by this Court in providing a time limitation for obscenity cases under the customs forfeiture statute. In *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), this Court held:

> Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seen undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe Sec. 1305(a) to require intervals of no more than 14 days from seizure of the goods to the

> institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court.

This rule of judicial administration was followed in *Gasparo v. City of New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998).

As a matter of constitutional law, this Court could instruct the state courts that they must provide an assurance of procedural due process by hearing and disposing sexually oriented business licensing appeals in a prompt and expedited manner. This Court could impose specific time limits such as 60 or 90 days, if necessary, in order to guide the lower state courts. *Thirty-Seven Photographs*, *supra*, at 373-74.

Amicus asserts that, as to "*Miranda* warnings," no state statute was required to impose the rule of *Miranda* which dictated that the police must read the *Miranda* rights to an arrested defendant. *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, every state and federal court knew on and after the *Miranda* decision that the failure to read a defendant his rights would require those courts to suppress evidence or confessions or otherwise provide an exclusionary rule in order to provide the procedural due process afforded under the Fifth Amendment.

Also, in the First Amendment context, this Court imposed a warrant requirement that is not necessary in other Fourth Amendment situations. That rule is self-executing and every state and federal court and law enforcement official knows by reading this Court's decisions what is required of them to provide such procedural due process. See *Roaden v. Kentucky*, 413 U.S. 496 (1973), and *Heller v. New York*, 413 U.S. 483 (1973); see also *New York v. P.J. Video, Inc.*, 475

U.S. 868 (1986); cf. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (procedures not properly followed).

A court's duty to insure proper procedural due process is a matter of the administration of justice and the supervision of the courts, and need not involve the imposition of statutory procedures by the state legislatures or Congress. Although a state could impose specific time limits and procedural mandates by statute or by codification of procedural court rules, nothing in the Constitution or the decisions of this Court requires it to do so. Some states have elected to do so in light of the federal decisions holding municipal sexually oriented business licensing ordinances or state statues unconstitutional. See *Cal. Code of Civ. P.* § 1094.8 (requiring prompt judicial decision in cases alleging prior restraint of speech or expressive conduct), *Tenn. Code Ann.* § 7-51-1110(d) (providing for prompt review); see also *Baby Tam v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) (Nevada Revised Statutes and local court's rules of practice amended to allow for prompt judicial review of prior restraint claims). However, if the federal courts had merely declared the need for judicial promptness in rendering a decision as a matter of procedural due process, then the state courts could have authoritatively construed existing statutes and provided adequate procedural due process, without infringing on the rights of the states to administer their laws and without the federal courts having had to enjoin or otherwise declare those state laws facially unconstitutional.

Without this Court's instruction as to the meaning of a prompt judicial determination—if indeed that is what is held to be required—questions will remain concerning the extent to which a judicial process must be completed before the time period becomes unreasonable. For instance, would "determination" require that an ordinance provide for

completion of review at both the trial and appellate levels, or is an initial judicial determination sufficient? Likewise, is it sufficient that there is the availability of the right to ask the reviewing court for a temporary restraining order to provide a judicial means of insuring the lack of restraint pending review or appeal? As the Fifth Circuit noted in *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994), to require that "all judicial avenues be exhausted would be an oxymoron," 24 F.3d at 709, and may be inconsistent with *Freedman*, 380 U.S. at 60, that review be provided in a manner "compatible with sound judicial resolution." Any announcement of a rule of procedural due process should be directed at the courts, without the need to strike city or county sexually oriented business licensing ordinances or enact new state statutes.

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the Court of Appeals and declare the City of Littleton's ordinance constitutional in that it properly provides for effective judicial review as required by this Court in *Thomas*.

Respectfully submitted,

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No. 02-1609

IN THE

Supreme Court of the United States

THE CITY OF LITTLETON, COLORADO,
Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., a Limited Liability Company, dba Christal's,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, PUBLISHERS MARKETING ASSOCIATION, and VIDEO SOFTWARE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

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THE CITY OF LITTLETON, COLORADO,

Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., a Limited Liability Company, dba Christal's,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation, International Periodical Distributors Association, Publishers Marketing Association and the Video Software Dealers Association submit this joint *amicus* brief in support of respondents, urging that this Court affirm the decision of the court below.[1] This brief is submitted upon the blanket consents of counsel to petitioner and respondent, filed with the Court.

INTEREST OF *AMICI*

Amici's members (hereinafter "*amici*") own and operate retail establishments which rent and sell books, magazines, videos, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining, or publish, distribute and are consumers of materials sold in such retail establishments. Libraries and librarians represented by the Freedom to Read Foundation provide such materials to readers and viewers.

Zoning and business regulatory ordinances applying limitations and restrictions based on the sexually explicit

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[1] A description of the *amici* is attached as Appendix B.

Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici curiae* discloses that he authored the brief in whole. No person or entity, other than Media Coalition, Inc., a trade association of which *amici curiae* are members or with which they are affiliated, and of which the parties in this action are not members, made a monetary contribution to the preparation or submission of the brief.

nature of First Amendment-protected material sold or displayed by retail establishments are proliferating, justified by the alleged negative impact of such establishments on their communities. As described more fully below, over the years the definitions of "adult use," "adult business," and "adult bookstore" in such ordinances have expanded in scope so that today they often do not comport with the common understanding of those terms. In many cases, as, for example, when defining adult businesses to include retailers deriving merely 10% of their income from material having sexual content, these ordinances apply even to retailers whose predominant product lines have no sexual content, explicit or otherwise.

In the past, many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g*, 4 F. Supp. 2d 1029 (D.N.M. 1998); *PSInet Inc. v Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979). They have also filed *amicus* briefs in the Court to advise it as to the impact of its decisions with respect to regulation of sexually frank speech on mainstream creators, producers, distributors and retailers. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Denver Area*

Educ. Telcoms. Consortium v. FCC, 518 U.S. 727 (1996); *United States v. X-Citement Video*, 513 U.S. 64 (1994).

SUMMARY OF ARGUMENT

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that certain procedural limitations on the operations of a censorship board decision-maker are required by the First Amendment. Many of these limitations relate to the imposition of discrete time limits so that unreviewable censorship is not achieved by inaction. This Court subsequently held in *FW/PBS, Inc. v. City of Dallas* that at least two of these limitations – that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained and that expeditious judicial review be available – apply equally to licensing of businesses that sell First Amendment-protected materials. 493 U.S. 215, 228 (1990)

It is undisputed that the Littleton ordinance at issue here imposes no time limit on the available judicial review; there is no requirement of expeditious judicial review. Nor does it, in the context of renewals, require maintenance of the status quo during the judicial review period so that the retailer can avoid premature and possibly wrongful closure.

It is both intolerable and unconstitutional to permit an existing business selling First Amendment-protected material to be closed or such a proposed business to be prevented from commencing business while waiting for a court to render an opinion concerning judicial review of a decision to revoke or deny a business license. Even if a court subsequently reverses the revocation or denial of the license, the business' First Amendment rights will have been infringed, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), and its progeny dealt with regulation of "adult businesses" as that term is commonly understood, namely businesses that exclude minors and whose inventory is predominantly sexually explicit in nature. The rationale of the Court in permitting such regulation of businesses engaged in the sale, rental or offering of First Amendment protected speech was that such regulation "represents a valid governmental response to the 'admittedly serious problems' created by adult theatres," and therefore was not content-based. 475 U.S. at 54. With the passage of time, however, municipalities have expanded and loosened the definition of adult business so that even mainstream business with only a minor portion of their business, inventory or display space devoted to material with sexual content fall within the scope of adult business regulation.

This creeping expansion has resulted in regulation of First Amendment-protected business as to which there are no readily apparent negative secondary effects as required by *Renton*, suggesting that the real purpose of such ordinances is not zoning directed at the avoidance of negative secondary effects, but rather is to make it more difficult to distribute, or even to suppress the sale of, these protected works in a given municipality.

Amici are mainstream providers of speech in a variety of fora and media. As more and more "adult use" regulations are applied to mainstream bookstores and video stores by stretching definitions beyond their normally understood meanings, the regulations restrict protected speech in a manner antithetical to the First Amendment, stigmatize retailers who deal in these protected materials, and chill such retailers from stocking and selling First Amendment-

protected mainstream materials which describe or portray sexual matters, either in a fictional or non-fictional context. The failure to have a prompt judicial decision reviewing such licensing decisions compounds such restriction, stigmatism and chill.

ARGUMENT

I
A RIGHT TO PROMPT JUDICIAL REVIEW IS OF LITTLE MEANING UNLESS IT INCLUDES A RIGHT TO A PROMPT DECISION

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that certain procedural limitations on a censorship board decision-maker are required by the First Amendment. Many of those limitations relate to the imposition of discrete time limits so that censorship is not achieved by inaction. This Court subsequently held in *FW/PBS, Inc. v. City of Dallas* that at least two of these limitations – that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained and that expeditious judicial review be available – apply to the licensing of communicative First Amendment-protected businesses. 493 U.S. 215, 228 (1990)

The Littleton ordinance at issue in this case (Littleton, Colo. City Code §3-14-1, et. seq.) does not provide for judicial review. The relevant review provision asserted by the City is found in the Colorado Rules of Civil Procedure, which gives a party 40 days to seek review by certiorari.

Colo. R. Civ. P. 106(a)(4)[2]. There is, however, no provision imposing a time limit for a decision, or even requiring expeditious review. The provisions referred to by the City permit expedited treatment; they do not mandate it. Nor is there any requirement for the maintenance of the status quo while judicial review is pending.

Under *Freedman*, a "prompt final judicial decision" is required. 380 U.S. at 59. Similarly, *FW/PBS* requires "prompt judicial review in the event that the license is erroneously denied." 493 U.S. at 228. The procedures applicable in this case are constitutionally deficient under both these tests.

Some courts have read the *FW/PBS* test to require only prompt access, i.e., to prohibit preventing petitioner from requesting such review for some period of time. *See, e.g., Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1255 (11th Cir. 1999). This is an untenable interpretation which fails to comply with both the language and intent of this Court. *See, e.g., Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998).

Prompt access alone is a meaningless right. When a retailer is faced with closing or is being prevented from opening, the ability promptly to file for judicial review has little value unless accompanied by a prompt decision and an

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[2] The review is also limited in scope, to whether the City "exceeded its jurisdiction or abused its discretion." Colo. R. Civ. P. 106(a)(4)(I). The cases define abuse of discretion as having "no competent evidence" to support the decision to restrict protected First Amendment activities (*City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995)), certainly a slender reed upon which to rely.

intermediate stay. A prompt filing followed by a judicial reversal two years later does not adequately protect the First Amendment rights of the vindicated business. Counsel for *amici* is unaware of any judicial system which grants judicial review but prevents petitioner from requesting such review for some period of time. And few, if any, administrative procedures impose a delay between the issuance of a denial and issuance of the final appealable order. Thus a "right" to prompt access is always available, but gives the petitioner nothing of value.

As the Ninth Circuit pointed out in *Baby Tam*,

> The phrase "judicial review" [in *FW/PBS*'s requirement of "prompt judicial review"] compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms it would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klem once said to an inquisitive catcher: "It ain't nothin' till I call it." This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'.

154 F.3d at 1101-02.

Rather, to effectuate the intent of both the *Freedman* and *FW/PBS* Courts, and to protect First Amendment rights, there must be an expedited, prompt judicial decision, so that the vendor of First Amendment-protected material is not left in limbo. In such a case, even more than usual, the adage that "justice delayed is justice denied" is applicable,

particularly since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

II
THE EXPANSION OF THE DEFINITION OF "ADULT BOOKSTORES" AND "ADULT BUSINESS" TO INCLUDE MAINSTREAM RETAILERS HIGHLIGHTS THE BREADTH OF THE CONCERN

Amici, general bookstores and other retailers of constitutionally protected communications, would be directly affected by the absence of a prompt and meaningful judicial review. *Amici* do not include "adult" retailers as that term is commonly used, but rather mainstream establishments, whose predominant products are not sexually explicit or even sexually related, although many stock some products which could be considered relevant under typical zoning or business license ordinances. However, ordinances that potentially apply to such mainstream establishments are proliferating.

City of Renton v. Playtime Theatres Inc., 475 U.S. 41 (1986), and its progeny dealt with regulation of "adult businesses" as that term is commonly understood, namely businesses that exclude minors and whose inventory is predominantly sexually explicit in nature. The rationale of the Court in permitting such regulation of businesses engaged in the sale, rental or offering of First Amendment protected speech was that such regulation "represents a valid governmental response to the 'admittedly serious problems' created by adult theatres," and therefore was not content-based. 475 U.S. at 54. With the passage of time, however, municipalities have expanded and lessened the definition of adult businesses so that even mainstream businesses with only a minor portion of their business, inventory or display

space devoted to material with sexual content fall within the scope of adult business regulation.

Recently municipalities have expanded the definition of the entities covered by "adult use" zoning ordinances so that they include mainstream retailers whose inventory and marketing approach is mainstream, not highlighting the sexual content of some of their book, film or periodical inventory. Municipal ordinances now in effect are not limited to retailers predominantly offering sexually explicit materials. As little as 10% of floor space (Edina, Minn., City Code, §850.03 (subd. 3)), 15% of display, shelf, rack, table or floor area (Fitchburg, Mass., City Code, §181-18.2(A)(1); Minneapolis, Minn., Code of Ordinances, §549.340), 15% of gross revenues or inventory (Rockwall, Tex., City Code, §27-1(2)), 150 square feet of floor space for display (St. Paul, Minn., Legislative Code, §60.200) devoted to material emphasizing the description or depiction of sexual matter qualifies a retailer as an "adult bookstore" or "adult business."[3] These ordinances all regulate far more than what the public considers "adult businesses." In St. Paul, Minnesota, for example, a general bookstore with a section on relationships and sexual manuals exceeding ten feet by fifteen feet is defined and would be regulated as an "adult bookstore."

An even more insidious Catch-22 applies where the ordinance defines an "adult" business as one which has a segregated section of "adult" material. City of Council Bluffs, Iowa, Ordinances §15.03.021. Under such an ordinance, a mainstream retailer who chooses to accommodate its more sensitive customers by segregating some more frank sexual materials finds itself branded as an "adult bookstore."

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3 *See* excerpts in Appendix A hereto.

While, as Shakespeare noted, "a rose by any other name would smell as sweet" because it would still be a rose, calling a rose poison ivy does not make it so. Similarly, statutorily defining a mainstream retailer as an adult business does not make it one, and labeling it such does not mean it would have negative secondary effects on its neighborhood.[4]

The lower the threshold created by the ordinance, the more intense is the economic pressure on mainstream businesses to cease selling any constitutionally-protected sexually frank material which might trigger the zoning restriction. A traditional "adult business," with admission restricted to adults, has an inventory which is virtually exclusively of interest to those who would enter such an establishment seeking sexually explicit material. Thus, in a municipality in which a *Renton*-type zoning ordinance is in effect, the choice for such a business is to geographically comply or to go out of business. Since such a business relies on a consumer base seeking its products, presumably many customers will seek them out wherever they locate.

The situation is different in the case of a mainstream book or video retailer, which carries a wide range of material, most of which has little or no sexual content. It is not an "adult bookstore" in the usual meaning of the term, and does not advertise or promote itself as such. But with thresholds in ordinances as low as 10% of total display area, stock or gross income devoted to material "emphasizing" sexual matters, or, as in Mesa, Arizona, having a significant portion of its gross income in *any one month* derive from the sale or

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4 *See, e.g., Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003) (studies finding negative secondary effects from video retailers offering on-premises viewing do not support ordinance applying to retailers selling only for off-premises viewing).

rental of sexually explicit material (City Code § 6-16(D)), a proprietor of a general bookstore or video store must be concerned. The likelihood is that the proprietor will self-censor First Amendment-protected materials to stay well clear of the zoning requirement since location is significant to economic viability.

An equally chilling effect on First Amendment rights is caused by ordinances such as Littleton's before the Court in this case, which apply to a retailer which devotes a "significant or substantial portion" of its space or inventory, or which derives a "significant or substantial portion" of its revenues, or which spend a "significant or substantial portion" of its advertising revenues to sexually explicit materials. There is no definition of "significant" or "substantial," leaving mainstream retailers guessing — a situation abhorrent in the First Amendment context. *See Smith v. California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.")

Nor are these ordinances limited to restricting the location of the retailer (though that, alone, constitutes a significant business restriction). Mesa, Arizona, for example, requires that the proprietor or anyone having a 10% interest in the business be licensed (City Code, §§ 6-16-3,4), requires that employees be licensed as "sexually oriented business employees" (City Code, §6-16-3(A)(2)), limits the hours of the retailer (City Code, §6-16-14), and imposes licensing fees of $500 per establishment and $50 per employee (City Code, §6-16-5). These requirements impose additional business costs on mainstream retailers incidentally carrying sexually-related constitutionally-protected materials, and also stigmatizes them and their employees.

Further, even if a prompt decision is required, and even more so if it is not, an existing seller of First Amendment-protected materials must be permitted to remain open pending judicial review of a decision to revoke or deny a business license, or of a decision to shutter the establishment because of an alleged zoning violation. To do otherwise would be to infringe the retailer's First Amendment rights, even if judicial review subsequently reverses the revocation or denial. The closing of any retail establishment obviously has a major impact on its business, from which it may never recover, even if it is subsequently permitted to reopen. Furthermore, during the closure period, the retailer will not know whether or when it may reopen. The only practical alternative for the retailer would be to self-censor by eliminating from its stock the First Amendment-protected materials which might possibly bring the establishment within the purview of the regulatory statute or ordinance. In either event, First Amendment rights are chilled, a prior restraint is achieved, and protected materials are not available at the location. That is not a result anticipated or permitted by *Freedman*, *FW/PBS* and the First Amendment.

CONCLUSION

Amici urge this Court to reverse the decision below on the ground that the Littleton ordinance and Colorado statutes neither require a prompt judicial review determination, nor require maintenance of the status quo pending such determination, and that such provisions are required by the First Amendment.

Dated: January 23, 2004

Respectfully submitted,

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APPENDIX A: EXCERPTS FROM SAMPLE ORDINANCES

1. COUNCIL BLUFFS, IOWA, ORDINANCES, SECTION 15.03.021:

"Adult bookstore" means an establishment that has a substantial or significant portion of its stock in trade in, or that has a segment or section devoted to the sale or display of books, magazines or other periodicals, videos, tapes, holographs or holograms, sexually-oriented paraphernalia, movies, games, materials, visual images or similar devices, along or in combination with each other, all or any of which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to "specified anatomical areas" or 'specified sexual activities" as defined in Sections 15.03.605 and 15. 03.606, respectively.

2. EDINA, MN, CITY CODE, SECTION 850.03 (SUBD. 3):

The following words, terms and phrases, as used herein, have the following meanings:

* * *

Adult Bookstore. An establishment or business which barters, rents or sells items consisting of printed matter, pictures, slides, records, audio tape, videotape, or motion picture film and either alone or when combined with Adult Motion Picture Rental or Sales and Adult Novelty Sales within the same business premises has either 10 percent or more of its stock in trade or 10 percent or

more of its floor area containing items which are distinguished or characterized by an emphasis on the depiction or description of Specified Sexual Activities or Specified Anatomical Areas.

3. FITCHBURG, MA, CITY CODE, SECTION 181-18.2(A)(1):

* * *

(1) ADULT BOOKSTORE or ADULT VIDEO STORE - A business that devotes more than 15% of the total display, shelf, rack, table, stand or floor area, utilized for the display and sale of the following:

(a) Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records, CD-ROMs or other forms of visual or audio representations which meet the definition of "harmful to minors" and/or "sexual conduct" as set forth in M.G.L. C. 272 S.31, . . .

4. MESA, AZ, CITY CODE, TITLE 6, CHAP. 16, SECTION 6-16-1:

* * *

ADULT BOOKSTORE, ADULT NOVELTY STORE, OR ADULT VIDEO STORE: A commercial establishment which offers sexually explicit material for sale or rental, for any form of consideration, and

meets any of one (1) or more of the following criteria:

(A) That has thirty percent (30%) or more of its inventory, stock, or merchandise on hand at any time that is comprised of sexually explicit material; or

(B) That has a substantial or significant portion of its inventory, stock, or merchandise on hand at any time that is comprised of sexually explicit material; or

(C) That derives thirty percent (30%) or more of its gross income for any one (1) calendar month from the sale or rental, for any form of consideration, of sexually explicit material; or

(D) That derives a substantial or significant portion of its gross income for any one (1) calendar month from the sale or rental, for any form of consideration, of sexually explicit material; or

(E) That at any time displays sexually explicit material either in a display area that is thirty percent (30%) or more of its total display area or on a floor area equal to at least two hundred (200) square feet. For purposes of calculating the floor area, the business premises shall be viewed from above in two (2) dimensions and all areas

that are reserved for foot traffic shall be included; or

(F) That displays a substantial or significant amount of sexually explicit material in its display area.

5. MINNEAPOLIS, MN, CODE OF ORDINANCES, SECTION 549.340:

* * *

Adults-only bookstore or video store. An establishment having as a substantial or significant portion of its stock in trade for sale, rental or display, books, magazines, periodicals, films, videos, digital video disks, slides, or other media, which are distinguished or characterized by an emphasis on matters depicting, describing or relating to nudity, sexual conduct, sexual excitement or sadomasochism, or an establishment with a segment or section devoted to the sale, rental or display of such material which comprises fifteen (15) percent or more of the total sale, rental or display area of such establishment, or five hundred (500) square feet, whichever is less. An adults-only bookstore or video store also shall include an establishment that offers films, videos, digital video disks, slides or similar media for viewing on premises.

6. ROCKWALL, TX, CITY CODE, SECTION 27-1(2):

* * *

(2) *Adult bookstore* or *adult video store* means a commercial establishment which as a principal business purpose openly advertises or displays or offers

for sale or rental for any form of consideration any one or more of the following:

(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slices, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas:; or

(b) Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

As used herein, "principal business purpose" shall include any business activity which accounts for fifteen (15) per cent or more of the following: (I) gross revenues of the business; (ii) floor area of the business; or (iii) inventory.

7. ST. PAUL, MN, LEGISLATIVE CODE, SECTION 60.200:

* * *

Adult bookstore. Adult bookstore means a building or part of a building used for the barter, rental or sale of a significant portion of items consisting of (1) instruments, devices or paraphernalia which are designed for use in

connection with "specified sexual activities," or (2) printed matter, pictures, slides, records, audio tape, videotape, motion picture film, or CD Roms or another form of recording if such items are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas." "Significant portion of items" shall mean more than fifteen (15) percent of usable floor area or more than one hundred fifty (150) square feet of floor area used for the display and barter, rental or sales of such items. No obscene work shall be allowed.

APPENDIX B: THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has it principal place of business in Northampton, Massachusetts, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located in Arkansas, throughout the country and the world.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of

libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Publishers Marketing Association (PMA) is a nonprofit trade association representing more than 3,700 publishers across the United States and Canada. PMA members publish and distribute mainstream books on a variety of topics including marriage, sex education, family and relationships, self help, art photography, glamour photography, photo techniques, as well as erotic fiction and romance novels. "Adult business" ordinances would chill its members' expressive activities by limiting the availability of legal materials to adults."

The Video Software Dealers Association (VSDA) is the trade association for the home video industry. It represents more than 1,200 member companies in the United States, Canada and a dozen other countries, including retailers of motion picture videos and video games, the home video divisions of major and independent motion picture studios, video game and multimedia producers, and other associated businesses that comprise the home video entertainment industry. VSDA retailer members sell and rent both non–sexual and sexually oriented material and thus may be subject to "adult business" ordinances.

(10)

No. 02-1609

Supreme Court, U.S.
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In the Supreme Court of the United States

CITY OF LITTLETON,

Petitioner,

v.

Z.J. GIFTS D-4, LLC, a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Lawyers Association ("FALA") is an Illinois-based, not-for-profit organization comprised of over 150 attorneys who routinely represent businesses and individuals that engage in constitutionally protected expression. FALA's members practice throughout the United States and Canada in defense of the First Amendment and, by doing so, advocate against governmental forms of censorship. Member attorneys frequently litigate the constitutionality of local adult business licensing schemes, often in light of the prompt judicial review requirement that is at issue here. In fact, each of the Court's two previous cases addressing the *FW/PBS* prompt judicial review safeguard were argued by FALA members, and the Respondent in this matter is represented by two FALA attorneys. Given the nationwide span of their experience and the specialized nature of their practices, FALA attorneys can better comment upon the practical application of licensing ordinances like Littleton's than perhaps any other singular person, body, client, or corporate entity.

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[1] This brief was authored in its entirety by counsel for *amicus curiae* First Amendment Lawyers Association ("FALA"). No other person or entity besides FALA, its members, or its counsel have contributed to the costs of preparing and submitting this brief. Counsel anticipate, however, that Deja Vu Nashville, Inc. may offset the printing costs associated with the brief once it has been filed.

Counsel for both Petitioner and Respondent have filed blanket consents to the filing of *amicus* briefs. This brief is therefore submitted pursuant to Supreme Court Rule 37.3(a).

FALA's members have repeatedly observed and battled governmental abuses of licensing ordinances throughout the country, particularly where a prompt judicial determination of the propriety of those abuses is neither guaranteed nor, as in most cases, available at all. Should the Court reverse the decision of the Tenth Circuit and hold that cities need not mandate a prompt resolution of the judicial review process, these abuses are likely to continue. Such a result not only adversely affects the clients of nearly every FALA attorney, but it also contravenes the First Amendment protections FALA and its members are dedicated to preserving.

SUMMARY OF ARGUMENT

The City of Littleton's licensing ordinance conditions the ability of an adult business owner to speak upon the approval of the government and therefore constitutes a prior restraint under *Freedman v. Maryland*, 380 U.S. 51 (1965), and *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). The Court's decision in *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), fails to undermine that conclusion. *Thomas* analyzed a content-neutral permitting requirement that applied equally to speech and non-expressive activities conducted only in a public park. As such, the ordinance considered in *Thomas* and the Court's analysis of that ordinance are of little value to the issues in this case. Rather, the ordinance here mirrors the adult business licensing scheme treated as a prior restraint in *FW/PBS*. It requires a business owner or other potential speaker to seek and obtain the government's stamp of approval before he can communicate.

To survive constitutional scrutiny, prior restraints like the one enacted by Littleton must include, at a minimum, a provision for prompt judicial review. *Freedman*, 380 U.S. at 51. Merely providing access to the courts in the event a

restraint is improperly imposed is insufficient to satisfy this requirement. Because delay is frequently used as an indirect method of censorship, a judicial decision must be reached within a fixed and reasonable period of time to ensure that speech is not wrongfully suppressed.

ARGUMENT

I. The Tenth Circuit Correctly Construed The Court's Prompt Judicial Review Requirement To Mandate A Prompt Judicial Resolution.

Consistent with the First Amendment, the Court has historically disfavored prior restraints upon protected expression. *See, e.g., Burstyn v. Wilson*, 343 U.S. 495 (1952). While such restraints take various forms, one technique frequently employed by governments to limit speech, either directly or indirectly, is a licensing system. In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court determined that licensing schemes targeting free expression are unconstitutional unless they contain certain procedural safeguards designed to limit the government's discretion and minimize the length of any restraint. The Court reaffirmed this essential holding twenty-five years later in *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990).

At issue in *FW/PBS* was a Dallas ordinance that required licenses of certain sexually oriented businesses, some of which, as disseminators of expressive materials, were entitled to First Amendment protection and some of which, as mere providers of sexual stimulation, were not. *Id.* at 224. Treating the ordinance as one which "largely targets businesses purveying sexually explicit speech," the Court held that, at a minimum, the ordinance must provide for the prompt issuance of a license and prompt judicial review of an

adverse licensing decision to survive. *Id.* at 228. These protections were deemed necessary even though the ordinance only permitted the licensor to make ministerial decisions, and not an assessment of content, in determining whether to issue a license. *Id.* at 229.

There has been much confusion about the meaning of the prompt judicial review requirement in the fourteen years since *FW/PBS* was decided. *See, e.g., Baby Tam & Co. v. Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) (holding that the prompt judicial review requirement mandates a prompt judicial decision on the merits); *Boss Capital, Inc. v. Casselberry*, 187 F.3d 1251, 1255-1267 (11th Cir.1999) (holding that the prompt judicial review requirement mandates only prompt access to the courts). In fact, the Court has accepted certiorari on two prior occasions in an attempt to resolve the dispute. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001). For the reasons that follow, the First Amendment Lawyers Association believes the Tenth Circuit correctly construed *FW/PBS* to require a prompt judicial resolution, particularly in light of the substantial reality that licensing schemes are often tacitly used to censor protected expression. FALA urges affirmance of that decision.

A. Like the Ordinance at Issue in *FW/PBS*, Littleton's Adult Business Licensing Scheme Constitutes a Content-Based, Prior Restraint on Speech.

A proper assessment of Littleton's licensing ordinance begins with the inquiry into whether it constitutes a content-based prior restraint or a content-neutral time, place, and manner restriction. As a general observation, licensing

mechanisms which condition the ability of a speaker to communicate on the prior approval of the government have systemically been condemned by the Court as prior restraints. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). Of particular significance here is the *FW/PBS* decision. Because the *FW/PBS* ordinance primarily applied to businesses which convey a sexual message, and then required that those businesses seek the prior approval of the government before opening, it constituted a content-based prior restraint presumed to be unconstitutional. *FW/PBS*, 493 U.S. at 227. No such presumption attaches to truly content-neutral regulations on the method of speech. The recent decision in *Thomas*, wherein the Court excused compliance with the *FW/PBS* procedural safeguards for a park permitting ordinance which did not on its face target speech and which only applied in public areas, is but one example of this relaxed analysis.

Without giving short shrift to the issue, it is obvious from the face of Littleton's ordinance that it constitutes a content-based prior restraint under *FW/PBS* and not, as the City contends, a time, place, and manner restriction under *Thomas*.[2] To be sure, the ordinance applies only to a particular type of business and not to a public location irrespective of the business' intended message. Read together, *Thomas* and *FW/PBS* reject the notion that regulations which target expression in this manner can be treated as content-neutral. Both the *FW/PBS* and Littleton ordinances apply to establishments that convey a similar

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[2] The City's contention in this regard is somewhat ironic, particularly considering that the sole question presented in this case presumes that *FW/PBS* and not *Thomas* applies here.

message or promote a similar theme, namely that of human sexuality, and are therefore content-based.[3] On the other hand, the activities potentially implicated by the park permit requirement in *Thomas* ranged from a baseball game, to a family picnic, to, as was the case, a political rally, none of which shared a common message and some of which were wholly unrelated to speech. *Thomas*, 534 U.S. at 322. For this reason only, the ordinance in *Thomas* was deemed content-neutral and subjected to less stringent constitutional analysis. *Id.*

In traditional time, place, and manner cases, businesses engaged in First Amendment activities may operate at some location or at some period of time without governmental interference. *See, e.g, Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-707 (1986) (finding no constitutional violation where an adult bookstore precluded from operating at its existing location as a nuisance remained free to relocate elsewhere); *Alexander v. United States*, 509 U.S. 544, 551 (1993) (upholding federal RICO statute against a First Amendment

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[3] The Littleton ordinance also calls upon government officials to make an assessment of content in applying the licensing requirement. First, by limiting the requirement to only those bookstores which devote a "substantial or significant" portion, and not a defined percentage, of their stock in trade, floor space, or advertising costs to sexually explicit material, the ordinance grants discretion to the licensor to determine who should apply and who should not. (Pet. Br. App. 13a-14a.) This decision necessarily turns upon the content of the materials the business sells. In addition, the ordinance permits the City Manager to suspend and ultimately revoke an existing license where "adult entertainment" is provided after hours or where other violations of the regulatory provisions occur. (Pet. Br. App. 31a-32a.) Inherent in this determination is also a consideration of content.

challenge because business owner could "open new stores, restock his inventory, [] hire staff . . . [and] go back into the adult entertainment business tomorrow"). For example, when an adult cabaret is subject to zoning requirements excluding it from the central business district or requiring it to be 1000 feet from a school, it may still locate in an industrial district or near commercial uses without approval from the government. This is not so when a licensing requirement exists. Rather than simply precluding a business from locating in certain areas, a licensing ordinance precludes a business from opening <u>at all</u> without the government's permission. This is a classic prior restraint.

Therein lies the fundamental difference, thus far ignored by the City, between the park permit requirement in *Thomas* and the City of Littleton's licensing scheme. Because the ordinance addressed in *Thomas* applied only to public parks and not to other public fora or private property generally, a speaker denied a permit to communicate his message in the park could nevertheless convey his expression by moving inside the walls of a public building or down the street to private property. The same cannot be said of the Littleton ordinance. Because Littleton's licensing scheme impacts a business' entire ability to operate, and not merely to operate in its desired location, it cannot constitute a time, place, and manner restriction subject to reduced scrutiny under *Thomas*. In addition, because the plain terms of the ordinance apply to speech and not location, it is not, as the City of Littleton espouses, content-neutral.

To say that the ordinance is nevertheless a content-neutral time, place, and manner restriction because it includes within its scope adult uses that deserve no free speech protection, i.e., escort agencies, sexual encounter centers, and the like, is to disregard the Court's clear pronouncement in *FW/PBS*.

To be sure, the Dallas licensing scheme at issue in that case also applied to businesses which arguably fall outside the ambits of the First Amendment, yet the Court treated the ordinance as one which "targets . . . speech." *FW/PBS*, 493 U.S. at 224 (noting that the ordinance applied to "escort agencies and sexual encounter centers" in addition to adult businesses protected by the First Amendment). Equally disingenuous is the argument that an ordinance which permits only ministerial licensing decisions, as opposed to denials based upon content, adequately protects speech such that no judicial review is needed. Justice O'Connor plainly observed that the Dallas ordinance in *FW/PBS* delegated only ministerial functions to the licensor, but still mandated that the ordinance provide swift and meaningful review of the licensor's decisions. *Id.* at 229. *FW/PBS* therefore establishes a rule with regard to prior restraints, to which *Thomas* is the antithesis not the exception. Where a licensing scheme imposes a prior restraint on protected speech, as the Littleton ordinance does, prompt judicial review must be provided.

B. Prior Restraints Must Include a Guarantee of Prompt Judicial Resolution to Pass Constitutional Muster.

The question then becomes what is meant by the term "prompt judicial review"? Is it a prompt judicial determination, as the Tenth Circuit and others have held, or is it merely the ability to access the courts shortly after a license is denied, suspended, or revoked? Both the Court's prior pronouncements and practical concerns about the First Amendment dictate that the former is the more logical and appropriate view.

At its inception, the prompt judicial review requirement was intended to guarantee swift decision-making by the courts. *Freedman*, 380 U.S. at 58 ("because only a *judicial determination* in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a *judicial determination* suffices to impose a valid final restraint") (emphasis added). Undergirding the requirement was the concern that an erroneous license denial without the promise of reversal by a court not only served to directly censor protected material, but might also deter individuals from even attempting to speak at all. *Id.* Given the potential for both direct and indirect censorship, the Court in *Freedman* required not only that prompt judicial review be guaranteed, but that the licensor reach its decision within a fixed, short period of time and that government bear the burden of going to court to prove the correctness of that decision. *Id.* at 58-60.

The concern for suppressed speech lingered in *FW/PBS*, but was insufficient to justify full application of all three *Freedman* guarantees. Because the ordinance at issue in *FW/PBS* required the licensor to perform only the ministerial function of granting or denying a license, and did not permit a consideration of content in reaching that decision, a plurality of the Court determined that the third prong of *Freedman* -- that the government bear the burden of going to court -- need not apply. *FW/PBS*, 493 U.S. at 229-230. In this regard, a plurality of the Court modified the *Freedman* standards to account for the fact that the *FW/PBS* ordinance was not a direct mechanism of censoring a singular, unpopular work, but rather utilized neutral criteria to implement a speech-related licensing scheme. This abbreviated *Freedman* test discounts the original procedural safeguards based on the fact that a licensing scheme, as opposed to a censorial board, is a more indirect method of limiting speech.

Aside from removing the third component of the *Freedman* safeguards, Justice O'Connor's plurality opinion in *FW/PBS* evidences no intent to weaken the prompt judicial review requirement from the prompt decision it originally mandated. The City and its *amici* make much of the terms "availability" and "possibility" that appear on isolated occasions in the opinion, arguing that these terms support a less restrictive interpretation of the requirement. As the Tenth Circuit rightly held, however, these terms refer to the identity of the party invoking the judicial review mechanism and not to the nature of the review itself. *ZJ Gifts, Inc. v. City of Littelton*, 311 F.3d 1220, 1236 (10th Cir. 2002). In Justice O'Connor's estimation, *Freedman* mandates that prompt judicial review be "available" and "possible" in the event of an adverse decision. *FW/PBS*, 493 U.S. at 227-28. These terms refer to the fact that the review is at the speaker's option. If the speaker chooses to seek a prompt judicial resolution, it must be available to him from the courts.

In dispensing with the requirement that the government bear the burden of going to court when no singular work is threatened, the Court acknowledged that a business that cannot operate because its license application was denied has every reason, economically and politically, to pursue judicial review. *FW/PBS*, 493 U.S. at 229-230. The City concedes this distinction, recognizing that the stakes may indeed be elevated when an entire operation, and not merely a single communication, may be suppressed. (Pet. Br. 14.) As a practical matter, it is precisely because so much is at stake that a prompt judicial determination is needed. Unlike *Freedman*, where the speaker's ability to communicate his message through other means or in another forum remained intact, a licensing scheme makes the business owner's entire ability to communicate contingent upon governmental approval. Even the slightest mistake, however honest or

invidious it might be, irreparably silences the speaker and censors the message. The ability to file a lawsuit in court, absent some guarantee that there will be a swift resolution of that suit, in essence promises nothing to those whose speech is stifled under the strong arm of government.

Except in cases of discretionary writs, where the court may decline to review the case at all, the availability of prompt access to the courts is a redundancy. The courts are always open; the clerks always accept filings that conform to the rules and are accompanied by the requisite fee; lawsuits are filed against the government every day. It is precisely because this type of prompt access is inherent in our judicial system that the term "prompt judicial review," when used in a First Amendment context, must mean something more. Otherwise, the requirement offers no protection at all to potentially silenced speakers.

The government complains that it will not be able to comply with a directive that judicial decisions in First Amendment licensing cases be reached promptly. This, it contends, will lead to a complete inability to regulate sexually oriented businesses. Yet the government need not worry that it will be unable to reform state law to ensure a prompt judicial resolution. The number of cities desiring to license sexually oriented establishments is high. (Pet. Br. 38 ("more than 30 cities [in Colorado] employ adult business licensing procedures similar to Littleton's")). Their collective voice will likely have considerable impact upon the state-wide legislative bodies that enact jurisdictional statutes and other rules governing the state courts. In fact, perhaps in anticipation of the Court's ruling on the issue, various states have reformed their state laws in order to provide prompt judicial decision-making in First Amendment licensing cases. *See, e.g.*, Cal. Code of Crim. Procedure § 1094.8; Tenn.

Code Ann. § 7-5-1110(d). Therefore, a decision that the First Amendment requires a prompt judicial determination is not a death blow to the government's supposed interest in combating the secondary effects of adult businesses, as suggested by Littleton and its *amici*.

Equally unfounded is the government's concern that requiring prompt judicial decision-making in adult business licensing schemes will elevate sexual expression over political speech. Notwithstanding *Thomas*, it is safe to presume that, should a city enact a licensing ordinance which on its face targets political or religious uses deserving of the highest form of First Amendment protection, that ordinance will be analyzed under the mandates of *FW/PBS* and *Freedman*. When a city undertakes, however, to impose less restrictive, content-neutral time, place, and manner regulations on speech which occurs on its own property, these regulations will be inspected more flexibly. Indeed, it is the action of the government and not the content of the speech that determines the appropriate level of constitutional scrutiny to apply. In this regard, it was not the political nature of the expression in *Thomas* that dictated the outcome there, nor should the sexual nature of the speech at issue dictate the outcome here. Rather, the focus should be upon the government's conduct and its potential impact upon speech.

The concern for latent censorship, whether by denial of a license or by implicit discouragement of potential speakers from seeking licenses, adheres as much today as it did in *Freedman* and *FW/PBS*. Merely allowing censored speakers to enter the courthouse without requiring meaningful and timely review fails to protect the First Amendment. If there is to be a judicial determination at all, it must be prompt. That was the Court's express pronouncement in *Freedman*, a

ruling which remained unchanged in *FW/PBS*, and that should again be the Court's pronouncement here.

C. Absent a Guarantee that a Judicial Decision Will be Promptly Reached, Licensing Schemes that Target Protected Expression May Be Used as a Subterfuge for Censorship.

It is more than a hypothetical concern that licensing schemes, however ministerial or routine, may result in improper suppression of expression. Actual situations involving *amicus* FALA's members and their clients indicate that this concern is quite real and quite potent.[4] For example, in *Redner v. Dean*, 29 F.3d 1495, 1497 (11th Cir. 1994), a case from Citrus County, Florida litigated by an FALA lawyer, the passage of an adult business licensing scheme was delayed until the day a new adult business was scheduled to open. Despite the fact that the County was seemingly aware of the business and had issued all required building and zoning permits, it waited until the last possible moment to enact an "emergency" adult business licensing scheme. *Id.* When the business refused to comply, the County criminally cited its owner for three of the first four days it was open,

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[4] Part and parcel with this reality is the distinct possibility that the licensor will purposefully and improperly apply content-neutral licensing criteria to affect a content-based result. For example, there is nothing to prohibit a city from erroneously concluding that an applicant is late on his taxes or that he was convicted of a disqualifying crime, thereby silencing the applicant while prolonged judicial review is pursued. Although the government may claim that it will not perform its ministerial functions in such an unscrupulous manner, that promise alone has never been sufficient to adequately protect constitutional interests.

subjecting him to the inconvenience of a trial and the possibility of criminal penalties. *Id.* at 1498. Though the threat of criminal prosecution is generally sufficient to chill future expression, the Citrus County owner persevered through several levels of appeals in the state and federal courts and ultimately succeeded in invalidating the ordinance on constitutional grounds. *Id.* at 1498-99. His ability to express his fully protected message, however, was threatened and chilled for the many years that the case was pending in court.

A similar situation occurred in Troy, Ohio in a case litigated by the undersigned FALA attorney. There, the City enacted a conditional use zoning ordinance the day after an adult cabaret and pool hall opened to the public. The ordinance operated as a prior restraint by requiring a license for the business. *See BJS No. 2, Inc. v. City of Troy*, 87 F.Supp.2d 800, 803-805 (S.D. Ohio 1999). Ten days later, when the business failed to secure a conditional use permit under the new restriction, the City revoked the necessary operational license previously issued to the company. *Id.* at 804. Following an unsuccessful administrative appeal of the revocation, BJS challenged the decision in state court and later by filing a complaint in federal court. *Id.* Shortly thereafter, the City petitioned the state court for injunctive relief against the operation of the business at its current location. *Id.* The state court refused to consider the cabaret's constitutional challenges to the conditional use ordinance and ordered the business closed. *Id.* Not until the federal court ruled the ordinance to be an unconstitutional prior restraint was the cabaret conclusively permitted to engage in its desired,

constitutionally protected form of expression. *Id.* at 809-810.[5]

Perhaps one of the most egregious examples of the misuse of a city's licensing powers occurred in Nashville. While litigation challenging the City's licensing requirement was pending in federal court, the Metropolitan Government of Nashville denied fifteen of the eighteen adult business license applications submitted by businesses who had been unsuccessful in their request for a preliminary injunction. (Agenda, April 27, 1999, FALA Br. App. 1a-8a). Among the reasons given for the denials were unclean couches, a broken toilet, the lack of covered trash cans, and an inadequate supply of hand towels. (*Id.*) The applicants were therefore censored from conveying their protected message until they restocked their restrooms and redecorated their interiors, and only then if they were successful in petitioning the government for adult business licenses. This absurd result occurred under the watchful eye of the federal courts, who ultimately invalidated Nashville's licensing ordinance as a prior restraint. *See Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001), cert denied, 535 U.S. 1073 (2002). Since the government engaged in this type of pretextual censorship

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[5] As brought to the attention of counsel by another FALA member, the State of Connecticut permits similar results. Per the opinion of the Connecticut Superior Court in *Aurilio v. Sweeney*, 24 Conn. L. Rptr. No. 7, 222 (Conn. Super. Ct. 1999), the decision of a police chief to revoke an occupational license is purely discretionary in nature and is therefore not subject to the state's mandamus procedure. As a result, government officials in Connecticut can now revoke the licenses of protected adult businesses with no justification at all and, in so doing, insulate themselves from being challenged in state court on constitutional grounds.

while being challenged in federal court, it is likely that more egregious abuses occur when the judiciary is otherwise indisposed.

One abuse that often occurs outside the presence of the courts is the chilling effect on speech that intensifies in the wake of increasing governmental intervention. Unlike the businesses attacked in Citrus County, Florida; Troy, Ohio; and Nashville, Tennessee, countless other unknown speakers may elect to forego their right to expression rather than engage in lengthy court battles over the propriety of the government's actions. The Court in *Freedman* recognized the need for judicial finality to avoid this type of self-censorship in the marketplace. *Freedman*, 380 U.S. at 58 (requiring "a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license"). The need is all the more palpable in today's economic climate, where businesses spend upwards of $25 million to build adult cabarets, nightclubs, and bookstores. *See, e.g.*, Adam Goldman, *Competition Hurting Las Vegas Strip: strippers-er, "clubs"*, Cincinnati Enquirer, April 27, 2003, at http://www.enquirer.com/editions/2003/04/27/biz_risquebusiness.html (noting that cost of new gentlemen's club in Las Vegas was $30 million). It is highly unlikely that investors will contribute such large amounts of capital towards a business which may not be able to operate until the conclusion of lengthy court battles, if at all.

Governments sometime argue that the issuance of a temporary license pending the outcome of judicial review can partially alleviate the chilling effect that results when a prompt judicial determination is not guaranteed. *See, e.g., Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000). That remedy, however, is inadequate to fully protect the First Amendment rights of businesses targeted by

prior restraint licensing schemes. A temporary license can be taken away just as easily as it is granted, with no notice and within a very short period of time. (*See, e.g.*, Pulaski Township Police Department Letter, FALA Br. App. 9a-10a (denying permanent license one month after issuance of temporary license)). Much as prospective speakers will not invest the resources necessary to operate an adult business on the promise of uncertain court proceedings, neither will they contribute towards a temporary license that may not even be in effect long enough to recoup their initial capital investment. In this regard, even a temporary license fails to adequately protect First Amendment rights when not coupled with expeditious judicial decision-making.

Moreover, imposing a temporary license requirement on existing businesses pending the final outcome of a potentially lengthy licensing process improperly alters the status quo under *Freedman*. *See FW/PBS*, 493 U.S. at 227. Most licensing ordinances require temporary license-holders to abide by all licensing regulations, including hours of operation and inspection provisions, while they maintain a temporary license. Requiring an existing business to comply with such burdensome and potentially unconstitutional regulations pending the outcome of an appeal fails to maintain the status quo as required by *Freedman*.[6] Moreover, the adult business will have suffered irreparable harm and will have been subjected to an unconstitutional licensing scheme that suppresses protected expression. *Elrod v. Burns*, 427 U.S. 347 (1976).

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[6] The Fifth Circuit accepted this proposition in *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994).

Absent a rule requiring a swift resolution of judicial proceedings when the government denies a license to engage in protected expression, the First Amendment rights of countless businesses and individuals are at risk of being irreparably harmed. As highlighted by the anecdotes above, governmental entities across the country have shown that they are unable to adequately protect the right to free expression on their own. Licensing schemes are frequently used as a subterfuge for censorship, particularly when controversial, sexual expression is involved. Cities attempt to do indirectly what they cannot do directly. Well-meaning speakers vested with the full protection of the First Amendment are unwittingly silenced. And the courts are, for most, a distant and tedious remedy. The outlook for speech is certainly bleak if the Court declines to recognize the prompt judicial review requirement as a mandate for swift decision-making in First Amendment prior restraint cases.

CONCLUSION

For the reasons set forth in this brief, the Tenth Circuit's decision construing the prompt judicial review requirement to mandate a prompt judicial resolution was not only a correct interpretation of the law, but also the most appropriate outcome to protect the First Amendment. As *amicus curiae*, the First Amendment Lawyers Association urges affirmance.

January 2004

Respectfully submitted,

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Counsel for *Amicus Curiae* First Amendment Lawyers Association

APPENDIX A

AGENDA

April 27, 1999
9:00 a.m.

METROPOLITAN ADULT ENTERTAINMENT BOARD
700 SECOND AVENUE SOUTH
HOWARD OFFICE BUILDING NASHVILLE

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

* * *

[p. 10]

* * *

Applications for adult entertainment licenses. Deja Vu of Nashville, 1214 Demonbreun Street.

[p. 11]

MS. BORUM: Our recommendation is that it does not comply with health inspections. Some of the items on that health inspection report is: To clean the couches, rest room walls, fixtures, shower stall; repair commode; provide

covered waste containers. Charles, in his inspection, noted a violation of the 3-foot rule.

MR. CHAIRMAN: All right.

MS. SCHAFFNER: I take it the fourth sheet back in the packet is the health inspection report?

MS. BORUM: That is correct.

MS. SCHAFFNER: And that inspection indicates that the couches need to be cleaned. Sanitation of the floors and the cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be repaired. The rest room walls and fixtures need to be cleaned. And the shower stall in the dressing room needs to be cleaned; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: Then . . .

MR. CHAIRMAN: Okay. So that it . . .

MS. SCHAFFNER: Then the inspector's report is the last sheet; is that right?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the inspector's [p. 12] finding upon inspection was that the dancers were in violation of the 3-foot rule; is that correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: On the codes or building there was no findings since there were no booths; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: And as far as the police report, it was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the zoning was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that we deny this application on the basis of the health inspection and the – this board's inspector's report.

MR. CHAIRMAN: It has been moved that we deny this report based on the – deny this application based on the inspector's report and this report from health.

Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussions? All in favor signify by aye.

(All board members voted aye.)

* * *

[p.15]

The next application is Pleasure Palace, 2407 Dickerson Pike.

Ms. Borum.

MS. BORUM: Our recommendation is that it does not comply with health codes. Some of these items were: Repair hand sink; clean walls and all air conditioning vents; clean storage areas; provide towels.

On your checklist sheet from Charles and myself, we received a late report yesterday afternoon from the building inspector who went out and made another inspection and approved the booth requirements.

MS. STEVENS: What does nonconforming mean?

MS. BORUM: Legally, "nonconforming" means that it was there prior to the funding. It's grandfathered in.

MS. SCHAFFNER: I take it that the building inspector's report disapproval since it . . .

MS. BORUM: It is marked disapproved on the checklist. I was handed the report about 5 until 4 yesterday afternoon.

MS. SCHAFFNER: Which disapproves or [p. 16] approves?

MS. BORUM: That approves, as far as the building inspector.

MS. SCHAFFNER: So the only thing that's disapproved, then, is the health . . .

MS. BORUM: That is correct.

MS. SCHAFFNER: . . . report, which includes a need for repairing hand sink for ease of cleaning; thoroughly cleaning the walls in booths and air conditioning vents in the hall; providing a minimum of 10-foot candles of illumination at the floor level in booths; cleaning up storage areas; eliminate all unnecessary items on lower level; and provide hand towels in the bathrooms; is that correct?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that this application be denied on the basis of the health report.

MR. CHAIRMAN: It has been moved that this application be denied on the basis of the health report. Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussion?

MR. BANKS: One question, Mr. Chairman. How will – how do they determine what the candle – how do they determine that?

[p. 17]

MS. SCHAFFNER: I think it's a lighting machine, you know, that . . .

MR. BANKS: That they carry with them that determines the lighting?

MS. BORUM: It's measured from the feet.

MR. BANKS: That's all I have.

MR. CHAIRMAN: Okay, all in favor signify by aye.

(All board members voted aye)

MR. CHAIRMAN: Any nays?

Motion carries. This application is denied.

* * *

[p. 26]

MR. CHAIRMAN: The next is Club Platinum, 1711 Hayes Street.

MS. BORUM: We recommend disapproval. It does not comply with health code. Some of those items: Repair toilet; clean showers; eliminate storage that may attract rodents and insects.

MS. CHAIRMAN: Everything else is approved?

MS. BORUM: Yes, sir, everything else is approved.

MS. SCHAFFNER: So that includes repairing the toilet in the men's rest room, cleaning the floors along the lockers in the dressing room?

[p. 27]

MS. BORUM: That is correct.

MS. SCHAFFNER: Cleaning the showers in the dressing room, eliminating storage that may attract rodents and insects and cause – something.

MS. BORUM: Harborage.

MS. SCHAFFNER: What is harborage?

MR. CHARLES WATKINS: Places for rodents or insects to hide.

MS. SCHAFFNER: All right. I move this application be denied based upon the health inspection report.

MR. CHAIRMAN: Do we have a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health inspector's report. All in favor say aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Application is denied.

* * *

[p. 43]

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The next application is the Executive Club,

[p. 44]

701 4th Avenue South.

MS. BORUM: We recommend disapproval. It does not comply with health codes. Some of these items: Repair couch, clean rest room floors, provide covered trash cans.

MS. SCHAFFNER: I move this application be denied based on the basis of the health violations.

MR. CHAIRMAN: Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health violations. All those in favor signify by – is there any discussion from the board? All in favor signify by aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? This application is denied.

* * *

APPENDIX B

PULASKI TOWNSHIP POLICE DEPARTMENT
LAWRENCE COUNTY
R. D. 1, Pulaski, PA. 16143
Phone 652-7610 or 964-8891

February 5, 2001

Eric Boron
1399 Highland Avenue
Salem, Ohio 44460

RE: Application for an Adult Use License
Pulaski Township Ordinance No. 2000-5-22

Dear Mr. Boron:

We have reviewed the application for an Adult Use License dated January 3, 2001 upon which we issued you a "temporary license" pursuant to Section 4 of Pulaski Township Ordinance 2000-5-22. May this letter serve as notice to you that your application for a "permanent license" is denied for the following reasons:

(a) Requirement 18 of the application requires an applicant to state hours of operation. Your application indicates that you will be operating your adult business Monday through Saturday twenty-four (24) hours per day and that the business will be closed on Sundays. Your proposed hours of operation are not in

compliance with Section 18 of Pulaski Township Ordinance 2000-5-22.

(b) Pursuant to an investigation conducted by officials of the Township, individuals have observed Adult Land operating after 10:00 p.m., which is in violation of Section 18 of Pulaski Township Ordinance 2000-5-22.

(c) Pursuant to an investigation of the business on February 2, 2001 the Employee on duty identified herself as Candace Ferguson of 510 N. Jefferson, Lisbon, Ohio 44432. This individual does not have a Temporary Employee License nor has she applied for one. This is in violation of Section 3, A3 of Pulaski Township Ordinance 2000-5-22.

Pursuant to Section 4.F., "Any person aggrieved by the denial, suspension, renewal or revocation of a license may appeal, in writing, within ten (10) days from the date of such denial, suspension, non-renewal or revocation to the Township Board of Supervisors in accordance with the procedures set forth in section 9.0." Specifically, Sections 9.A and 9.B. set forth your appeal rights under the Ordinance.

Very truly yours,

/s/ _____
Chief James B. Morris, Jr.

cc: H. Louis Sirkin
Carl Max Janavitz, Esquire
Richard A. Harper, Esquire